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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 19

CHARLES PAUL, DIRECTOR OF AGRICULTURE OF THE STATE OF CALIFORNIA, AND STANLEY MOSK, ATTORNEY GENERAL, STATE OF CALIFORNIA, APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (R. 558–582) is reported at 190 F. Supp. 645.

JURISDICTION

The judgments of the district court were entered on April 17, 1961 (R. 666, 668), and notices of appeal were filed by appellants on April 26, 1961 (R. 669, 671). By order entered in the district court on June 7, 1961, the time for docketing the appeal in this Court was extended to and including July 24, 1961. App. Br., 159. On January 15, 1962, this Court postponed consideration of the question of jurisdiction until the hearing on the merits (R. 878;

368 U.S. 965). The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

QUESTION PRESENTED

Whether the district court was correct in holding that California could not constitutionally prohibit vendors of milk from contracting with the United States, at prices other than those prescribed by the California Director of Agriculture, for sales of milk to the United States at the Travis, Castle, and Oakland military installations.

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of the California statutes dealing with the authority of the California Director of Agriculture to regulate prices for the sale of milk by distributors to the United States, and the penalties for violations, are set forth in Appendix A, *infra*, pp. 95–98. Pertinent provisions of the California statutes transferring exclusive jurisdiction over lands within the State to the United States are also set forth in Appendix A, *infra*, pp. 98–103. Pertinent provisions of the federal statutes and regulations applicable to procurement of milk supplies are set forth in Appendix B and Appendix C, *infra*, pp. 104–114.

STATEMENT

This is a direct appeal from the judgments of a three-judge district court convened in the Northern District of California to hear these two consolidated actions. The district court permanently enjoined the appellants, the Director of Agriculture and the Attory General of the State of California, from enforc-

ing California's minimum milk price regulations with respect to milk or milk products sold to the United States at three military installations located within the territorial limits of California.[1] The court held that the application of the California minimum milk price regulations to the sales in question violated the United States Constitution for two independent reasons: (a) the sales occurred on territories over which the United States had acquired exclusive legislative jurisdiction pursuant to Article I, Section 8, Clause 17; and (b) the State price regulations conflicted with federal procurement regulations which declare a policy of obtaining milk supplies by competitive bidding at the most advantageous price to the United States. The relevant facts are as follows:

1. BACKGROUND

Prior to January 1959, the United States purchased milk supplies at Travis, Castle, and Oakland, by formal advertising, as required by the federal procurement statutes and regulations. For example, at Castle bids for supply contracts were solicited from distributors who had been approved by either the Army or the Air Force, after sanitation inspection, for supplying milk to the armed forces (R. 246, 248). Upon receipt of the bids, it was the duty of the Base Contracting Officer to analyze the bids, recommend the award or rejection of the contract, and, for contracts exceeding $25,000, forward the bids to the appropriate higher authority for approval (R. 248).

[1] Travis Air Force Base (Travis), Castle Air Force Base (Castle), and Oakland Army Terminal (Oakland).

The milk supply contracts at the three installations were awarded on a competitive basis to the lowest responsible bidder, and on terms below the minimum milk prices prescribed by the State Director of Agriculture (R. 244, 794–798, 27–28).

a. *Travis.*—Toward the end of 1958 the State Director of Agriculture notified milk distributors that the State Milk Act and minimum milk price regulations applied to sales of fluid milk made to the United States at Travis (R. 173). This notification was confirmed by a telegram, dated January 16, 1959, declaring that the State had jurisdiction over sales of fluid milk to Travis (R. 175).[1] As a result of this action, subsequent bids for milk supply contracts at Travis were in strict compliance with the price regulations established by the State (R. 795). The resulting added cost to the government amounted to approximately $15,000 a month (R. 795).

Faced with this situation, in which distributors were threatened with court actions if they entered into contracts for the sale of fluid milk to the United States at Travis at terms other than those determined by the State regulatory agency, the United States filed a complaint in the District Court for the Northern District of California, Northern Division, on December 10, 1959, pursuant to the provisions of 28

[1] On September 29, 1959, California instituted a civil action in the state courts against the Milk Producers Association, a cooperative association which had been supplying milk to Travis at prices below the state prescribed minimums (R. 173), seeking civil penalties and an injunction restraining the Association from paying its producer members less than the state wholesale minimum prices (R. 181, 184).

U.S.C. 1331, 1345 (R. 178). The complaint requested the convocation of a three-judge court; stated that Travis is situated on land over which the United States has exclusive jurisdiction; and alleged that as a result of the action taken and threatened by appellants "bids for milk to be sold and delivered to plaintiff at Travis Air Force Base have been submitted on a noncompetitive and uniform basis since November 1958, at the minimum rate set forth in the [State] regulations" (R. 180).

The complaint alleged that the State of California, and the Director of Agriculture and Attorney General thereof, are precluded by the Federal Constitution from regulating prices of milk sales to the United States where the sales and deliveries are made on a federal enclave, such as Travis, which is subject to the exclusive jurisdiction of the United States. It further asserted that the State minimum milk price regulations are unconstitutional and void, as applied to such sales, under the Supremacy Clause, because they place an "unreasonable and unconstitutional burden and impediment upon the exercise by the United States of its constitutional powers under Art. 1, Sec. 8, Cls. 11 through 17; Art. 2, Sec. 2, Cl. 1; and Art. 4, Sec. 3, Cl. 2." These constitutional provisions authorize the establishment and maintenance of the Army, Navy and militia, and the acquisition and exercise of exclusive jurisdiction over federal territories. The complaint sought a judgment declaring, *inter alia*, that the California Milk Act and regulations are unconstitutional and void insofar as they prohibit producers and distributors of milk from

selling and delivering milk to the United States at Travis at rates lower than those established by the State; and enjoining the appellants from making any effort to prohibit such producers, distributors or the United States from negotiating contracts for the sale of milk to the United States at Travis at rates lower than the State-prescribed minimums.

b. *Castle and Oakland.*—In December of 1959 the State Department of Agriculture circulated a letter to milk distributors advising them that the minimum milk price regulations were applicable at all federal installations wherein exclusive jurisdiction has not been ceded to the United States (R. 245, 280). The letter listed but a few of the 635 federal installations, military and otherwise, located within the territorial limits of California (R. 392) as being within exclusive federal jurisdiction, and threatened that the minimum milk price regulations would henceforth be enforced with respect to sales to all other installations. Neither Castle nor Oakland were included on this list of federal enclaves. Also in December 1959, the Bureau of Milk Control wired a distributor that bids for the sale of fluid milk to Castle "must be made at prices not less than the minimum wholesale prices" established for the applicable marketing area (R. 279).

The bids to supply fluid milk to the United States at Castle, received in December 1959, were all at or above the State prescribed minimums (R. 245). These bids were rejected "as not being independently arrived at in open competition" (*ibid.*). A new invitation for bids was thereafter mailed on January 13, 1960, and of the nine bids received, one was below

the State minimum (R. 246). In February 1960, appellants brought an action for an injunction and civil penalties against the successful bidder (R. 194, 744). Similar actions were brought against other distributors who had made sales at prices below those promulgated by the State (R. 750, 769).

Because of the virtual elimination of competition at Castle and the anticipated increased cost of procuring milk as a consequence of the intensified pressure of the appellants, the United States, on March 22, 1960, amended the complaint which it had filed in the District Court for the Northern District of California, Northern Division, to add Count II. (R. 191). Count II alleged that the State minimum milk price regulations were unconstitutional as applied to sales of milk to the United States at Castle because the federal government had acquired exclusive jurisdiction over the lands on which the milk was delivered, and because they placed an unreasonable burden and impediment upon the exercise by the United States of its constitutional powers to raise and maintain an army.

As in the case of Castle, bids for milk supply contracts received at Oakland after appellants' letter of December 1959, *supra*, p. 6, were at or above the minimum prices set by California (R. 28). None of the bids were accepted, and the government's supply contract for the preceding period with the distributor Milk Producer's Association was extended for a three-month period, with an estimated savings to the United States of $30,243.90 for that period (R. 28). On March 30, 1960, the United States commenced a

separate action against the appellants in the United States District Court for the Northern District of California, Southern Division, with respect to milk sold to the United States at Oakland (R. 1, 7). The complaint was substantially identical to the complaint filed regarding contracts for the sale of milk to Travis, discussed *supra*, pp. 4–6.

2. The Proceedings Below

By their answers (R. 183, 156, 197), appellants denied that the United States had satisfied the State statutory requirements for the acquisition by the federal government of exclusive jurisdiction over the subject installations. They further contended that there was no conflict between the State regulations prescribing the minimum prices at which the government could purchase milk for use at Travis, Oakland and Castle, and the federal policy of procuring supplies by competitive bidding. Appellants also urged that the court should "stay further proceedings pending an authoritative determination of doubtful state law by the California courts in actions now pending in such state courts" (R. 185).

On April 14, 1960, the United States filed a motion for summary judgment, pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, on Count I (Travis) of the amended complaint filed in the Northern Division of the court below (R. 168). The motion sought judgment upon the ground that the sales of milk to the United States at Travis are made on land within the exclusive jurisdiction of the United States, and that, by enforcement of the minimum milk price

statute, appellants are "interfering with a Federal function, namely, the purchase of fluid milk and fluid milk products at prices most advantageous to the Government * * *" (R. 169). The motion was supported by affidavits of federal military and civilian personnel, which were generally concerned with the acquisition of jurisdiction over Travis and the effect of the enforcement of the milk price regulations on the federal procurement of milk supplies on a competitive basis.

On the same date, by consent of the parties, the suit with respect to Travis and Castle was ordered transferred from the Northern to the Southern Division of the district court and consolidated with the suit involving Oakland (R. 203). On April 18, 1962, the United States filed a motion for summary judgment with respect to Count II of the amended complaint originally filed in the Northern Division (R. 208). The two consolidated cases, involving all three installations, were then heard on the basis of the affidavits submitted by the parties, the pertinent federal and State constitutional and statutory provisions, and documentary evidence as to the acquisition by the United States of the lands comprising Travis, Castle and Oakland.

3. THE OPINION OF THE DISTRICT COURT

The district court refused to stay the proceedings below pending termination of State court actions brought against distributors who had entered into procurement contracts with the United States. The court ruled that "the question whether the United States

acquired exclusive legislative jurisdiction over the lands comprising the various military reservations under discussion is a federal question arising under Title 28 U.S.C. Sections 1331, 1345. *Mason Co.* v. *Tax Commission*, 302 U.S. 186, 197" (R. 561). It held that it could not abstain from exercising its jurisdiction over this federal question because there was no hazard of unnecessarily resolving difficult and uncertain issues of State law, citing *Allegheny County* v. *Mashuda*, 360 U.S. 185.

At the outset of its opinion, the court below recognized that this Court had already held, in *Pacific Coast Dairy* v. *Department of Agriculture*, 318 U.S. 285, that the United States Constitution prohibited California from applying its minimum milk price regulations to sales consummated on lands over which the United States had acquired exclusive jurisdiction. After an extensive review of the facts and the State statutes relating to the acquisition of exclusive jurisdiction by the federal government, the court found that the lands on which milk was delivered at Travis, Castle and Oakland were under exclusive federal jurisdiction, and, accordingly, immune from State regulation.

The district court also noted that *Penn Dairies* v. *Milk Control Commission*, 318 U.S. 261, decided the same day as *Pacific Coast Dairies*, had held that there was no conflict between the Pennsylvania Milk Control Law of 1937, which is similar to the California Milk Act, and the federal procurement statutes and regulations then in effect. The court, however, pointed to the fact that the federal procurement statute had been

comprehensively revised since the *Penn Dairies* decision, and that the cornerstone of the present federal procurement policy, as stated in *Public Utilities Commission of California* v. *United States*, 355 U.S. 534, in which this Court struck down California's regulation of transportation rates under the Supremacy Clause, is competitive bidding through formal advertising. The district court held that there is no difference between the federal policy of competitive bidding as applied to State regulation of federal procurement of transportation and State regulation of the terms on which the federal government can contract for the procurement of milk.

Having found, moreover, that the California Milk Act, like the statutes involved in the *Public Utilities* case, imposed prohibitions on the federal government, the district court concluded (190 F. Supp. at 657):

> that even if the *Penn Dairies* case has not been in effect overruled by the *Public Utilities* case, it is inapplicable here because the California Milk Stabilization Act "places a prohibition on the Federal Government" within the meaning of the *Public Utilities* case, and, therefore, so conflicts with federal procurement statutes and policy as to be invalid under the Supremacy Clause, Art. VI, Sec. 2.

The court's judgments in both of the consolidated cases enjoined the appellants from enforcing "against producers or distributors of milk or milk products or against the United States or its purchasing agents, with respect to sales, purchases, or deliveries of milk or milk products at the Oakland Army Terminal [or "at Travis or Castle Air Force Bases"] either the

state minimum producer price, wholesale price, or retail price regulations * * *" (R. 666, 669).

Although these orders appear to apply only to sales made at the three military installations and not to sales made on land subject to State jurisdiction by producers (dairy farmers) to wholesale distributors who later resell to the United States, any possible ambiguity in this regard no longer presents an issue requiring review by this Court. For, after appellants filed their jurisdictional statement in this Court, the federal government reviewed its policy with respect to the applicability of the California milk regulations to sales of milk to be used at military installations. As a result of that review, the United States stated on page 5 of its Memorandum In Response To Jurisdictional Statement that:

> There is no longer any necessity for the Court to consider whether appellants can constitutionally enforce the established California minimum *producer* prices with respect to milk farmers selling to distributors for processing and ultimate resale to the United States. The federal government, while not conceding that California can regulate producer prices, over the objection of the federal government, where the milk is to be resold to the United States, has concluded as a matter of procurement policy not to assert immunity from these minimum prices but to accede to full compliance with those requirements. * * *

The federal government will continue to adhere to this policy with respect to the enforcement of the California minimum producer price regulation of

sales to distributors for resale to federal military installations.[8]

SUMMARY OF ARGUMENT

I

The Court has jurisdiction of this direct appeal under 28 U.S.C. 1253. Direct appeal lies under that section from a suit "required to be heard by a district court of three judges." Thus, the sole question is whether the three-judge court below was properly convened under 28 U.S.C. 2281.

In deciding this question there is no need to consider whether a three-judge court was required to consider the issue of a conflict between federal and State regulatory provisions under the Supremacy Clause. A three-judge court is clearly required, under Section 2281, to adjudicate substantial claims of "unconstitutionality" of State law based upon a direct contravention of constitutional provisions limiting State power or delegating power to the federal government. The complaints in this case satisfied this requirement without regard to the claim of a conflict of State law with federal statutes and regulations, for in addition to that claim, they alleged that the California statutes were "unconstitutional and void" as applied to sales of milk at Castle, Travis and Oakland (a) because regulation of sales on these tracts violates the constitutional grant of

[8] If the Court believes that the outstanding orders of the district court are sufficiently ambiguous as to threaten the application of a contempt sanction if one of the appellants attempts to enforce the State milk regulations against producers selling to distributors on territory subject to State jurisdiction, we suggest that the case be remanded to the district court for a clarifying amendment of its final order.

exclusive federal jurisdiction under Article I, Section 8, Clause 17; and (b) because such regulation burdens the exercise by the United States of its constitutional powers to maintain the armed services, to regulate federal territory, and to carry out other constitutional functions.

II

The State of California cannot enforce its Milk Act with respect to sales consummated on lands subject to exclusive federal jurisdiction. *Pacific Coast Dairy* v. *Department of Agriculture*, 318 U.S. 285, 294. The issue in this case, therefore, is whether the United States has acquired exclusive jurisdiction over the lands at Travis, Castle, and Oakland on which milk sales are consummated.

Article I, Section 8, Clause 17 of the United States Constitution specifically provides that the federal government shall exercise exclusive legislative jurisdiction over lands purchased by it with the consent of the State in which the lands are located for the erection of forts, arsenals and other needful buildings. This clause has consistently been interpreted to mean that a State's consent to the purchase of land by the United States for one of the enumerated purposes operates to vest the federal government with exclusive jurisdiction over the land. The only legislative powers that the State can exercise with respect to such lands are those which it expressly reserved in granting its consent to the purchase.

The record fully substantiates the findings of the court below that the United States purchased the lands on which sales are concluded at these installa-

tions with the consent of the California legislature, and that it has otherwise complied with the relevant constitutional and statutory requirements for the transfer of exclusive jurisdiction under Article I, Section 8, Clause 17.

Appellants' argument that the United States nevertheless did not acquire exclusive jurisdiction over these tracts because it admittedly did not comply with the requirements of separate statutes providing for the cession of exclusive jurisdiction to the United States is without foundation. The United States can acquire exclusive jurisdiction over lands located in a State either by purchasing the land with the consent of the State (Article I, Section 8, Clause 17, United States Constitution) or by a cession of such jurisdiction by act of the State. California has separate statutes dealing specifically with each of these two methods of relinquishing jurisdiction. In support of its contention that the United States has not obtained exclusive jurisdiction over the tracts in question, California relies upon conditions and reservations which are applicable, by their own terms, only to its statute dealing specifically with a "cession" of jurisdiction and which are neither found in nor applicable to its statutes dealing with the relinquishment of jurisdiction by consent to the federal purchase of land under Article I, Section 8, Clause 17. Since jurisdiction over the tracts in question was obtained pursuant to Article I, Section 8, Clause 17 of the federal constitution, this jurisdiction is unaffected by conditions or reservations applicable only to an alternative method of ceding jurisdiction.

The present price regulations, which California is seeking to enforce with respect to sales of milk on the enclaves here in issue, are not assimilated as federal law because they were adopted subsequent to the acquisition of exclusive federal jurisdiction over the tracts on which the sales are consummated.

III

The Milk Act and distributor price regulations cannot constitutionally be applied to purchases made by the United States from appropriated funds for the additional reason that this State system of price-fixing conflicts with the federal procurement policy of freely contracting on a competitive basis to obtain the lowest overall price for the United States.

In *Public Utilities Commission* v. *United States*, 355 U.S. 534, this Court held that a State system of price regulation similar to that involved here could not be applied to procurement by the United States in view of the federal policy which provides in detail for a method of purchase intended to assure that the United States obtains the benefits of competition among and free bargaining with private sellers of supplies or services. An identical result is required here since the federal statutory and regulatory policy with respect to the purchase of milk does not differ in any significant respect from that determined in the *Public Utilities* case. The conflict between California's price regulations and the federal policy is made clear by the Armed Services Procurement Regulations requiring that milk be purchased at fair and reasonable prices calculated to result in the lowest

ultimate overall cost to the United States, and that all procurement, whether by formal advertising or negotiation, be made on a competitive basis to the maximum practicable extent.

Penn Dairies v. *Milk Control Commission,* 318 U.S. 261, is not controlling here because the decision in that case was predicated upon different procurement statutes and regulations. Between the date of that decision and the holding in the *Public Utilities* case, Congress enacted a comprehensive revision and restatement of the law governing the procurement of supplies and the new statute holds to the time tested method of competitive bidding. Of still greater importance is the fact that the regulations in force at the time of the *Penn Dairies* decision were interpreted by the Court as indicating that State price regulations were applicable to sales to the United States. The present regulations, which are substantially similar to those involved in the *Public Utilities* case, plainly indicate that State price regulations are not applicable and thus provide the fundamental distinction between the *Penn Dairies* case and both *Public Utilities* and the instant case.

IV

Even apart from the effects of the federal statutes and regulations, the Georgia rate regulation is unconstitutional because it violates the United States' inherent constitutional immunity from State regulation. A State may not directly regulate or tax the property, instrumentalities, or activities of the United States. In the present case the State's attempt to

violate the constitutional immunity is plain for the State's command is verbally addressed to a class including the United States and its agents. The rule is the same, however, whether the State's command is addressed to a federal procurement officer or takes the form of a restriction on the contracting powers of all potential sellers of goods or services to the United States, for it is the activities of the United States—including the exercise of its power to contract—which must be free of direct State interference.

This immunity of the transactions of the United States from State regulation or taxation is supported by the prior decisions of this Court as well as by the reasons underlying the prohibition against State regulation or taxation addressed to the federal government itself. Justice Bradley's statement in *Railroad Co.* v. *Peniston*, 18 Wall. 5, 41–42, that a contract, "is the means employed for carrying into execution the powers of the government" and therefore "is exempt from taxation or other intereference by the State government" has never been rejected by this Court and was indeed repeated with approval in the leading case of *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 155.

The reasons requiring immunity for the exercise of federal contracting powers from State regulation of the terms to which a supplier may consent are identical to those which have always justified a federal immunity from State regulation or taxation addressed to the federal government or its agents. First, only unseemly and harassing conflicts could result from the recognition of a State's capacity to

regulate the exercise of powers entrusted to the United States by the Constitution. Here California has frankly asserted the power to dictate the terms in contracts of the United States for the purchase of milk, for regulation of the terms which private parties may put into contracts with the United States *is* regulation of the terms for which the United States may contract.

Second, regulation of the transactions of the United States, no less than regulation of its other activities, is likely to impede the performance of federal functions.

Finally, the prohibition of State taxation addressed to the federal government draws a line which at once protects the United States from any State's attempt to write a check on the federal treasury yet does not grant an unwarranted immunity to State residents who happen to have done business with the United States rather than with some other purchaser of goods or services. The burden of California's price regulation, like that of a forbidden direct tax upon federal property or privileges, cannot fall upon the residents of California and is intended to make use of the federal treasury to increase the return to California's milk dealers.

V

None of appellants' contentions of procedural errors in the district court are grounds for reversal of the decision.

The district court was not required to abstain from deciding the issue of exclusive federal jurisdiction over the tracts at Travis, Castle, and Oakland. The

only constitutional questions involved had long been settled by the Supreme Court. There was no separable issue of State law; for the meaning and effect of a State's "consent" to the federal purchase of land within the meaning of Article I, Section 8, Clause 17, is a federal question. The issue was not one solely and peculiarly of local concern but rather involved the rights and powers of the United States and a problem of federalism particularly appropriate for resolution in the federal courts. Finally, neither the complaint nor the district court's decision broadly threatens the execution of California's regulatory scheme with regard to the great mass of milk sales within the State.

It is even clearer that abstention was not required on the question whether the Milk Act prohibited federal officials from purchasing milk at prices below the State-imposed minimum. This question is of only peripheral importance to any of the three issues on the merits in these proceedings. A State decision that California imposed no such prohibition would neither avoid nor materially alter any of the federal constitutional questions involved herein.

The factual and legal issues involved in the Oakland proceedings were fully and adequately before the district court when it rendered its decision in the consolidated cases involving Travis, Castle, and Oakland. The propriety of the district court's restraint of State court proceedings between different parties is irrelevant to this case in its present posture, for, whether or not issuance of the temporary restraining order was correct, the district court could and did properly proceed to judgment. Therefore this judg-

ment is properly before the Court for review on the merits.

ARGUMENT

I

THE COURT HAS JURISDICTION OF THIS DIRECT APPEAL FROM THE THREE-JUDGE COURT, WHICH WAS PROPERLY CONVENED

In its order of January 15, 1962 (R. 878) the Court postponed a determination of jurisdiction and directed the parties "to brief and argue, in addition to the merits, the question of this Court's jurisdiction on direct appeal under 28 U.S.C. Sec. 1253; see 28 U.S.C. Sec. 2281". The condition of direct appeal under 28 U.S.C. 1253 is that the suit be one "required * * * to be heard * * * by a district court of three judges". The question thus raised is whether the three-judge court below was properly convened under 28 U.S.C. 2281—that is, whether the government's suit was brought to enjoin the enforcement of a California statute on "the ground of the unconstitutionality of such statute," within the meaning of that section.

1. The "unconstitutionality" of State law for the purpose of 28 U.S.C. 2281 may be asserted in two ways. First, it may be claimed that State law directly contravenes constitutional provisions limiting State power (*e.g.*, Art I, Sec. 10; the Fourteenth Amendment) or delegating power to the federal government (*e.g.*, Art I, Sec. 8). If such a claim is substantial, a three-judge court is required to adjudicate it. *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713; *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen*, 362 U.S. 73.

Second, it may be claimed, as in *Kesler* v. *Department of Public Safety*, 369 U.S. 153, that a State law conflicts with federal legislation and hence violates the Constitution through the provision of the Supremacy Clause (Article VI, clause 2) that "the Laws of the United States" as well as "[t]his Constitution", "shall be the supreme Law of the Land." In *Kesler*, speaking for the Court, Mr. Justice Frankfurter held that a three-judge court was required when the alleged conflict between federal and State statutes presented "a sole, immediate constitutional question" of federal supremacy without preliminary "issues of statutory construction" (369 U.S. at 158). Dissenting, Chief Justice Warren (joined on this point by Mr. Justice Stewart) urged that conflicts of federal and State legislation do not involve a claim of "unconstitutionality" within 28 U.S.C. 2281.

The complaints in the instant cases alleged two grounds of unconstitutionality which brought the cases under the first head of jurisdiction for a three-judge court without the necessity of considering the second.

First, the complaints alleged that the appellants are "precluded by the Federal Constitution from regulating prices of milk sales to the United States where the sales and deliveries are made on an area subject to the exclusive jurisdiction of the United States" (R. 181; see also R. 11, 195). This ground of attack upon the California Milk Act was bottomed directly upon the conflict of that statute with Article 1, Section 8, Clause 17 of the Constitution, delegating to the federal government exclusive jurisdiction over

"all Places purchased by the Consent of the Legislature of the State * * * for the Erection of Forts * * * and other needful Buildings".[4]

As a second ground justifying convocation of the three judge court, the complaints alleged that the minimum milk price regulations were unconstitutional and void because they burdened the exercise by the United States of its powers to maintain the armed services, to regulate federal territory and property, and to carry out other constitutional functions. This ground of attack upon the California Milk Act did not involve any claim of conflict with federal legislation; it relied directly upon the implied constitutional immunity. Furthermore, the claim obviously presented a substantial question, since it involved California's assertion of power to regulate federal officers in the performance of their governmental functions of procuring milk for troop ration and resale at base commissaries at the most advantageous price to the Government. And it also posed as a constitutional issue—besides the conflict of statutes—whether the Milk Act imposes a direct prohibition on the national government or its officers (R. 576).

[4] If California had agreed that its laws could not be applied to a federal enclave and had argued only that the places in question had not been purchased with the consent of the California legislature, then there might be room for dispute as to whether a three-judge court was required to resolve this issue. But California also asserted the right to apply her milk control law to the places in question even if they had been purchased with the consent of the California legislature; and plainly the answer to the question thus posed turns directly and immediately upon an interpretation of the Constitution.

On these grounds, a three-judge court was required, even if the constitutional questions were joined with issues under the Supremacy Clause not involving "unconstitutionality" within the meaning of 28 U.S.C. 2281.[4] This was the holding of *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen*, 362 U.S. 73, where this Court stated (at p. 85):

> Where a complaint seeks to enjoin a state statute on substantial grounds of federal unconstitutionality, then even though unconstitutional grounds of attack are also alleged, we think the case is one that is "*required* by * * * Act of Congress to be heard and determined by a district court of *three* judges." 28 U.S.C. § 1253. (Emphasis added.) We, therefore, hold that we have jurisdiction of this direct appeal.

II

THE DISTRICT COURT CORRECTLY HELD THAT CALIFORNIA CANNOT CONSTITUTIONALLY APPLY ITS MILK ACT TO SALES AT TRAVIS, OAKLAND AND CASTLE BECAUSE THE LANDS ON WHICH MILK SALES ARE CONSUMMATED AT THESE INSTALLATIONS ARE ENCLAVES WITHIN EXCLUSIVE FEDERAL JURISDICTION

The rules controlling and determining the result in this case are firmly established and easily applied to the facts before the Court. The law of exclusive ter-

[4] Once the three-judge court was thus convened, the case would be properly brought here on direct appeal even if the decision below—and the appeal—rested on nonconstitutional grounds. *Florida Lime & Avocado Growers* v. *Jacobsen*, 362 U.S. at 80–

ritorial jurisdiction has been carefully applied by this Court for more than a century. It is therefore desirable to begin with a summary of the controlling precedents and the rules they establish, only later turning to their application to the facts of the present case.

A. ARTICLE I, SECTION 8, CLAUSE 17, AND THE PRECEDENTS THEREUNDER

Article 1, Section 8, Clause 17, of the United States Constitution provides that "Congress shall have Power * * *

> To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;

A number of the significant principles that have been developed under this clause are directly relevant to the present case.[6]

81, 84–85 (opinion of Court), 89–90 (dissent); *Railroad Comm'n of California* v. *Pacific Gas & Electric Co.*, 302 U.S. 388, 391; *Sterling* v. *Constantin*, 287 U.S. 387, 393–394.

[6] The history of this clause of the Constitution is set out in *The Report of the Interdepartmental Committee for the Study of Jurisdiction over Federal Areas Within the States*, Part II, pp. 15–27.

Again in *Surplus Trading Co.* v. *Cook*, 281 U.S. 647, 652, the Court held that:

> It long has been settled that where lands for such a purpose are purchased by the United States with the consent of the state legislature the jurisdiction theretofore residing in the State passes, in virtue of the constitutional provision, to the United States, thereby making the jurisdiction of the latter the sole jurisdiction.[9]

This proposition is by now firmly established, subject only to the minor qualification that, since 1940, the

[9] This long-continuing understanding that a State's consent to a federal purchase of land carries with it, by force of the United States Constitution, exclusive federal jurisdiction over the land is neatly summarized by considering one of the two purposes of a Joint Resolution of Congress in 1841, 5 Stat. 468, which is set forth in the appellants' appendix at pp. 170–172. That Congress apparently shared fully the framers' beliefs as to the necessity of federal jurisdiction over federally owned lands, for Paragraph 6 imposed on each Executive Department the duty of attempting to obtain from the States involved jurisdiction over all lands within those States which had formerly been purchased by the United States without the federal government obtaining this jurisdiction (*i.e.*, without the consent of the State legislature to the purchase). To assure exclusive jurisdiction over all future purchases Congress merely provided "[t]hat no public money shall be expended upon any site or land hereafter to be purchased by the United States * * * until * * * the consent of the Legislature of the State in which the land or site may be shall be given to said purchaser." Congress plainly understood that a State's consent to a federal purchase of land carries with it, by virtue of Article I, Section 8, Clause 17, exclusive federal jurisdiction over the land. See 24 Ops. Atty. Gen. 619; 31 Ops. Atty. Gen. 260, 263, 282; 38 Ops. Atty. Gen. 341.

United States has been required by statute to assent to the transfer of jurisdiction over the property purchased. See 40 U.S.C. 255.

2. *The Federal Government may purchase land within a State without the State's consent, but, in such circumstances, it does not obtain the powers of exclusive legislation found in Article I, Section 8, Clause 17 of the Constitution*

The Joint Resolution of 1841, discussed *supra*, p. 28, n. 9, plainly indicated the understanding of Congress that land within a State could be purchased by the federal government without the consent of the State, for otherwise it would have been unnecessary to order the Executive Branch to obtain the consent of the State legislature before making such purchases. Any lingering doubts as to this federal power to purchase without State consent were laid to rest in 1875 by *Kohl* v. *United States*, 91 U.S. 367, where the Court found not only a power to purchase but also a power to condemn land without the consent of the State.[10]

[10] "* * * The powers vested by the Constitution in the general government demand for their exercise the acquisition of lands in all the States. These are needed for forts, armories, and arsenals, for navy-yards and light-houses, for custom-houses, post-offices, and court-houses, and for other public uses. If the right to acquire property for such uses may be made a barren right by the unwillingness of property-holders to sell, or by the action of a State prohibiting a sale to the Federal government, the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of a State, or even upon that of a private citizen" (91 U.S. at 371).

The effect of a purchase of land within a State without the State's consent was defined with great clarity in the *Fort Leavenworth* case (114 U.S. at 531. See also *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 147):

> * * * Where lands are acquired without such consent, the possession of the United States, unless political jurisdiction be ceded to them in some other way, is simply that of an ordinary proprietor. The property in that case, unless used as a means to carry out the purposes of the government, is subject to the legislative authority and control of the States equally with the property of private individuals.

For an earlier decision to the same effect, see *United States* v. *Stahl*, 27 Fed. Cas. 1288, No. 16,373 (C.C.D. Kan. 1868).

3. *In situations in which the United States has obtained property within a State in a way or for purposes not falling within Article I, Section 8, Clause 17, the State may cede to the United States legislative jurisdiction over the property*

The United States may thus purchase or condemn land within a State without the State's consent. It may also purchase land, with or without the State's consent, for other purposes than those broad categories listed in Article I, Section 8, Clause 17. (See n. 18, p. 41, *infra*.) In either event, the United States would not obtain exclusive jurisdiction over the purchased land by force of the federal constitution. In the *Fort Leavenworth* case the Court was asked to determine whether there was any way in

which the United States could obtain legislative jurisdiction over land which it owned but had not acquired pursuant to Article I, Section 8, Clause 17. The Court held that, by an act of the State (and without any application of Article I, Section 8, Clause 17), jurisdiction could be ceded to the federal government, saying (114 U.S. at 541, 542):

> * * * It is for the protection and interests of the States, their people and property, as well as for the protection and interests of the people generally of the United States, that forts, arsenals, and other buildings for public uses are constructed within the States. As instrumentalities for the execution of the powers of the general government, they are, as already said, exempt from such control of the States as would defeat or impair their use for those purposes; and if, to their more effective use, a cession of legislative authority and political jurisdiction by the State would be desirable, we do not perceive any objection to its grant by the Legislature of the State. * * *

This holding has never been questioned.

4. *A State may condition its consent to the Federal purchase of land and thereby retain some part of its jurisdiction*

The Court held in *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 146–149, that a State may condition its consent to the federal purchase of land within its borders upon its retention of some part of its jurisdiction. Although this Court has never passed on the question, it would appear that a State may also

1. *Consent of a State to the purchase of land within its borders by the United States for one of the enumerated purposes confers upon Congress exclusive jurisdiction over the land by operation of the United States Constitution*

A careful reading of Article I, Section 8, Clause 17 makes clear that the United States Constitution itself grants to Congress exclusive legislative jurisdiction over federal enclaves when the terms of Clause 17 are satisfied. Jurisdiction passes by force of the Constitution and not by force of any act of the State. State consent to the purchase of the land is, of course, one of the conditions set forth in Clause 17, but no State statute intended to deal with a cession of jurisdiction is necessary. Once unconditional consent to the purchase of the land is given, jurisdiction over the purchased land passes to the federal government by virtue of Article I, Section 8, Clause 17 of the Federal Constitution.

This reading of the plain wording of the constitutional provision is confirmed by its history. The framers had no doubts about the necessity of exclusive federal jurisdiction over lands purchased, for example, for military purposes. The necessity inhered in the protection of the expenditure of public money and in the effectuation of the purposes of the purchase.[1] As

[1] The purpose of the grant of exclusive jurisdiction over land within a state purchased by the United States and the reason for requiring consent of the state are set forth by Madison in Number 43 of the Federalist Papers. Having discussed the necessity of exclusive federal power over the seat of the federal government, Madison continued (p. 200):

"The necessity of a like authority over forts, magazines, etc.,

this Court later pointed out,* there may even have been doubt as to the power of Congress to purchase land without obtaining exclusive jurisdiction. Therefore the consent of a State to the federal purchase of land was intended to carry with it, by constitutional mandate, the exclusive federal jurisdiction the framers thought necessary over federally owned land.

Finally, the decisions of this Court have laid to rest any doubt as to the self-effectuating force of Article I, Section 8, Clause 17, once a State has consented to the purchase of land within its borders. In *Fort Leavenworth Railroad Co.* v. *Lowe*, 114 U.S. 525, 530, the Court stated this understanding unequivocally, explaining that:

> * * * it was provided that when [the United States] might require such lands for the erection of forts and other buildings for the defence of the country, or the discharge of other duties devolving upon it, and the consent of the States in which they were situated was obtained for their acquisition, such consent should carry with it political dominion and legislative authority over them. * * *

established by the general government, is not less evident. The public money expended on such places, and the public property deposited in them, require that they should be exempt from the authority of the particular State. Nor would it be proper for the places on which the security of the entire Union may depend, to be in any degree dependent on a particular member of it. All objections and scruples are here also obviated, by requiring the concurrence of the States concerned, in every such establishment."

* *Fort Leavenworth Railroad Co.* v. *Lowe*, 114 U.S. 525, 530-531.

condition its consent to a federal purchase upon federal compliance with reasonable procedural requirements such as the necessity of filing a plat. See, *Report of the Interdepartmental Committee for the Study of Jurisdiction over Federal Areas Within the States*, Part II, pp. 78–80.

5. *The constitutional grant to Congress of exclusive legislative power prevents the exercise of State legislative power over federally purchased land unless the State has conditioned its consent to the purchase on a reservation of such power*

The wording of the Constitution itself hardly left room for any doubt as to this conclusion. Article I, Section 8, Clause 17 provides expressly that Congress' authority over places purchased for, *inter alia*, military purposes with the consent of the State legislature shall be the same as that it exercises over the seat of government. California may no more legislate over land purchased with its consent within its borders than Maryland may legislate over the District of Columbia (*Fort Leavenworth Railroad Co.* v. *Lowe*, 114 U.S. 525, 532–533).

> When the title is acquired by purchase by consent of the Legislatures of the States, the federal jurisdiction is exclusive of all State authority. This follows from the declaration of the Constitution that Congress shall have "like authority" over such places as it has over the district which is the seat of government; that is, the power of "exclusive legislation in all cases whatsoever." Broader or clearer language could not be used to exclude all other authority than that of Congress; and that no other

> authority can be exercised over them has been the uniform opinion of Federal and State tribunals, and of the Attorneys General.

See also, *Surplus Trading Co.* v. *Cook*, 281 U.S. 647, 652; *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 141–142; Cf., *Standard Oil Co.* v. *California*, 291 U.S. 242; *Collins* v. *Yosemite Park Co.*, 304 U.S. 518, 533; *Arlington Hotel Co.* v. *Fant*, 278 U.S. 439.

B. THE APPLICATION OF THESE PRINCIPLES TO CALIFORNIA'S ATTEMPT TO REGULATE MILK PURCHASES AT TRAVIS, CASTLE, AND OAKLAND

In the light of these long-established principles, what this Court must determine in the present case is clear. If the land on which the milk sales and purchases were consummated was within the exclusive legislative jurisdiction of the United States, then California has no more power to regulate the price than Maryland has to set the price of milk that Maryland distributors sell in the District of Columbia. The particular parcels of land involved are within the exclusive jurisdiction of the United States (a) if they were purchased with the consent of the legislature of California;[11] (b) if in granting its consent the State legislature did not impose as a condition the retention of a legislative power which would include the power to regulate milk prices thereon; and (c) if the United States has complied with 40 U.S.C. 255, which has, since 1940, required the United States to accept or as-

[11] There is, and can be, no issue but that the purchase of the tracts presently in issue were purchases for the erection of "Forts, * * * Arsenals * * * and other needful Buildings" as used in Article I, Section 8, Clause 17. See *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 143.

sent to the transfer of exclusive jurisdiction. See *Adams* v. *United States*, 319 U.S. 312.

1. *The controlling facts as to each military base.*

a. Travis

Milk contracts for Travis are negotiated by the Base Procurement Officer from Building Number 245 (R. 822).[12] Invitations for bids are prepared and mailed from that building, and received and opened there (*ibid.*). Bids for contracts in excess of $25,000 are originally accepted by the Base Procurement Officer, but his decision must be concurred in by federal agencies not located at Travis (R. 822–823). In all cases, however, notices of acceptance of contracts are mailed from Building 245 (R. 822–823). Milk purchased by the Base Procurement Office is delivered to the following buildings: Numbers 247, 112, 106, 572, 80, T–628, and the 3083d Mess Hall (R. 876, 644). The Project Ownership Map of Travis (formerly Fairfield-Suisun) (R. 819) shows that these buildings are located on the following tracts and were purchased from private individuals named on the Project Ownership Map on the following dates:

Bldg. No.	Located on tract	Date of purchase
245	17B	January 22, 1943 (R. 806, 705, 707).
247	17A	January 22, 1943 (R. 806, 705, 707).
112	16	March 1, 1943 (R. 806, 702).
106	16	March 1, 1943 (R. 806, 702).
572	7	December 4, 1942 (R. 805, 698).
80	18A	January 23, 1943 (R. 806, 711).
T-628	16	March 1, 1943 (R. 806, 702).
3083d Mess Hall	18	February 16, 1943 (R. 805, 714).

[12] The Base Procurement Officer does not purchase milk for non-appropriated-fund activities at Travis (R. 515, 538).

Thus, the lands at Travis on which contracts are negotiated and sales are consummated (see Cal. Civil Code, Sections 1737, 1739(4), (5), 1783) were purchased by the United States between December, 1942, and March, 1943. It is not denied that these lands were purchased for the erection of forts, arsenals, or other needful buildings. Further, at the time of the purchase of these tracts, the California Legislature, by statute, consented to the purchase or condemnation by the United States of any tract of land within the State for the erection of forts, etc. without conditioning this consent upon the reservation of any legislative jurisdiction.[13] Finally, the United States has

[13] Section 34, Political Code, as amended by Statutes of 1939, Chapter 710, p. 2231:

"The Legislature consents to the purchase or condemnation by the United States of any tract of land within this State for the purpose of erecting forts, magazines, arsenals, dockyards, and other needful buildings, upon the express condition that all civil process issued from the courts of this State, and such criminal process as may issue under the authority of this State, against any person charged with crime, may be served and executed thereon in the same mode and manner and by the same officers as if the purchase or condemnation had not been made and upon the further express condition that the State reserves its entire power of taxation with respect to such tracts of land and may levy and collect all taxes now or hereafter imposed in the same manner and to the same extent as if this consent had not been granted.

"The authority to serve civil and criminal process and power to tax hereinabove reserved to the State in the case of the purchase or condemnation by the United States of any tract of land within this State shall, any law to the contrary notwithstanding, also be reserved to the State with respect to any tract of land over which any jurisdiction is ceded or granted by the State to the United States under any law of this State now in effect or which may hereafter be adopted, the authority and

assented to the transfer to it of exclusive jurisdiction over these lands by "blanket" letters of acceptance from the Secretary of War to the Governor of California dated April 16, 1943 (R. 339) and January 3, 1944 (R. 339), and by a letter of March 14, 1944 specifically referring to Fairfield-Suisun (now Travis) (R. 213–222, 216). Having complied with the relevant constitutional and statutory requirements, the United States acquired exclusive jurisdiction over the tracts at Travis on which milk contracts are negotiated and sales are consummated."

b. Castle

Although milk was delivered at Castle on Parcel 12 prior to February 15, 1960, when appellants instituted an action in the California State courts to enforce the Milk Act (R. 642), sales are now consummated on Tract A (R. 247, 642). The milk delivered to Tract

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power herein reserved by the State to be exercised in the same manner and to the same extent as if such jurisdiction had not been ceded or granted by the State to the United States."

Section 34 was repealed, effective August 4, 1943, and codified to read (Cal. Stats. 1943, Ch. 134, pp. 896, 898):

"The Legislature consents to the purchase or condemnation by the United States of any tract of land within the State for the purpose of erecting forts, magazines, arsenals, dockyards, and other needful buildings, reserving the authority to serve and execute process and the State's entire power of taxation as provided in this article."

[14] Assuming *arguendo*, that some milk, not contracted for by the Base Procurement Office on Tract 17–B, is being delivered to areas over which the United States has not acquired exclusive legislation, that milk is not within the territorial immunity from State regulation. This, however, would not affect the immunity of sales consummated on tracts over which the United States has acquired exclusive legislation.

A is used by the United States at the troop messes and post commissary located on Parcel 12 (R. 642).

Acquisition of Tract A was authorized originally under the Lanham Act, 42 U.S.C. 1521, by a Directive from the Commissioner of the National Housing Agency, dated July 3, 1942, for the construction of civilian war housing (R. 223; 228–233 (reference at 229 to Merced); 234). Jurisdiction over the project was transferred to the Department of War on September 1, 1942 (R. 223, 235–240; (reference to Merced at 237 and 238)), and the United States first purchased title to Tract A on July 17, 1943.[15]

On the date of purchase (July 17, 1943, or April 6, 1943), California Political Code Section 34, discussed with reference to Travis, *supra*, pp. 35–36, was in effect and operated to give the State's consent to the purchase. The United States assented to the transfer of exclusive jurisdiction to it over Tract A at Castle (then known as Merced) by "blanket" letters of acceptance dated April 16, 1943 (R. 374) and January 3, 1944 (R. 339), and by letter of March 14, 1944, referring to Merced Army Air Field (R. 213–222). Since Tract A was purchased with the consent of the state, it is within exclusive federal jurisdiction and transactions concluded there are immune from State regulation.

[15] Title was purchased from one Phillips by deed dated April 6, 1943 (R. 223, 226). Appellants argued below, however, that the United States did not acquire title under this deed until July 17, 1943, when Phillips himself received a deed from the Federal Farm Mortgage Corporation. (See R. 571; App's Br. 85–86; R. 490–495). For purposes of this litigation, the United States accepts July 17, 1943, as the date of purchase.

c. Oakland

Milk purchased by appellee at Oakland Army Terminal is received on Parcel B–210 (R. 646–647).[16] Parcel B–210 was purchased by the United States on March 2, 1942 (R. 369, 639). At that time, Political Code Section 34, discussed *supra*, gave California's consent to the purchase of lands within the State for the purposes enumerated in Article I, Section 8, Clause 17. The United States accepted jurisdiction over Parcel B–210 by "blanket" letters of assent dated April 16, 1943 (R. 374), January 3, 1944 (R. 339), and by letter dated March 14, 1944 specifically referring to Oakland (R. 213–222, at 219). As our analysis of Travis and Castle demonstrates, these occurrences vested exclusive control over Parcel B–210 in the federal government.

Moreover, on April 21, 1949, the Secretary of the Army again mailed a notice to the Governor of California informing him that the United States accepted jurisdiction over lands at Oakland (R. 372). At this time, Political Code Section 34 had been replaced by Government Code Section 126, enacted in 1946.[17] To comply fully with the requirements of Section 126 as well as those of Section 34, the government, on July 5, 1950, filed an application for public hearing before the State Lands Commission (R. 368). Following the public hearing, on October 5, 1960, the

[16] Appellants argue that milk is also delivered to Parcel A-119, citing R. 647. However, admission 33 does not support the proposition that milk is received at Parcel A-119, but merely that the Officers Club is located there.

[17] Section 126, as it was at all times possibly relevant to the present litigation, is set forth below in Appendix, p. 101.

State Commission adopted a resolution (R. 137–148) finding that the United States had complied with the conditions precedent to the granting of State consent under Section 126, including the statutory requirements that the acquisition "must be for the erection of forts * * * and other needful buildings * * * within the purview of Clause 17 of Section 8 of Article I" (Section 126(a); R. 138); that the "United States must in writing have assented to acceptance of jurisdiction over the lands * * *" (Section 126(c); R. 139); and, that the acquisition was in the interest of the State (R. 140). Accordingly, if exclusive control over Parcel B–210 did not vest in the United States by operation of Section 34 of the Political Code, it clearly was transferred to the United States by virtue of the State's consent under Government Code Section 126.

2. *California's contentions*

With a flurry of largely unrelated arguments appellants attempt to avoid the force of the constitutional mandate that "Congress shall have Power * * *: To exercise exclusive Legislation in all cases * * * over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts * * * and other needful Buildings * * *." We shall deal with each of the arguments in turn.

a. The claim that California's statutes consented only to the Federal purchase of land and not to the cession of exclusive jurisdiction

California argues first that "the California legislature in granting state consent to the federal pur-

chase of land for military purposes * * * did not intend to transfer exclusive jurisdiction to the United States." Appellant's Brief, pp. 89–99. One complete answer to this is that the Constitution does not require that the State legislature consent to a transfer of exclusive jurisdiction before the federal government can acquire such authority; rather, it declares that the United States shall exercise sole authority if, as California did here, the State consents to the *purchase* of the land ("and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State * * *"). This clear distinction, which is developed in detail *supra*, p. 26, was emphasized by the Court in *Fort Leavenworth Railroad Co.* v. *Lowe*, 114 U.S. 525, 530:

> This power of exclusive legislation is to be exercised, as thus seen, over places purchased, by consent of the Legislatures of the States in which they are situated, for the specific purposes enumerated. It would seem to have been the opinion of the framers of the Constitution that, without the consent of the States, the new government would not be able to acquire lands within them; and therefore it was provided that when it might require such lands for the erection of forts and other buildings for the defence of the country, or the discharge of other duties devolving upon it, and the consent of the States in which they were situated was obtained for their acquisition, such consent should carry with it political dominion and legislative authority over them.

See also, *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 141–142.

Had the framers meant that the State must consent specifically and explicitly to a cession of legislative jurisdiction, they would not have provided that Congress' exclusive jurisdiction depends solely upon the consent of the State to the federal purchase. As the quotation from the Federalist Papers, *supra*, p. 27, n. 7, indicates, the writers of the Constitution believed that a transfer of exclusive legislative jurisdiction was an implicit predicate of a federal purchase of land for one of the enumerated purposes. They therefore limited their protection of the interests of the States to a right to deny consent to the purchase of land by the United States. Any other requirement would have left the protection of the federal investment and purposes in the purchase of land at the mercy of a court's construction of the subjective "intent" of the State legislature.[18]

In any event, the constitutional mandate that exclusive jurisdiction shall be transferred upon a State's uncon-

[18] For this reason appellant's reliance on *Wilson* v. *Cook*, 327 U.S. 474, is badly misplaced. In *Wilson*, the United States did not purchase the lands for the purposes enumerated in Article I, Section 8, Clause 17. Instead, the lands were acquired under a congressional statute authorizing the reservation of forest lands by the federal government, and this federal statute expressly provided that the "[s]tate wherein such land is situated shall not, by reason of such reservation and administration, lose its jurisdiction * * *." 327 U.S. at 486–487. Similarly, the Arkansas "consent" statute in *Wilson* did not consent to the purchase of land for the purposes enumerated in the Constitution, but merely consented to the purchase of forest lands by the United States. The Court, therefore, properly held that Arkansas did not surrender jurisdiction over these lands in the absence of express words to that effect in the statute.

ditional consent to the federal purchase of land for one of the enumerated purposes was plainly contemplated in the passage of the California "consent" statutes. Political Code Section 34, which was in effect at the time of all three purchases, clearly indicates that the State was consenting to a transfer of exclusive jurisdiction pursuant to Article I, Section 8, Clause 17. Thus, the statute makes an express reference to land acquisitions for the purposes set forth in that clause of the Constitution—*i.e.*, "The Legislature consents to the purchase or condemnation by the United States of any tract of land within this state for the purpose of *erecting forts, magazines, arsenals, dockyards, and other needful buildings*" (emphasis added). It then goes on to make specific, limited reservations of jurisdiction—to tax and serve process. The express reservation of certain limited powers is indicative of the understanding that all other jurisdiction would pass to the federal government. This obvious construction was recently adopted by the Attorney General of California who likewise concluded that Political Code Section 34 is a consent to the transfer of exclusive jurisdiction to the federal government. 23 Ops. A.G. Cal. 14.[19]

That the California legislature was aware of the jurisdictional consequences of its grant of consent to a federal purchase is made even clearer when one

[19] Appellants attempt to distinguish this Opinion on the ground that it was not concerned with the extent and nature of federal authority over Fort Ord, the military installation there-involved. The question presented, however, was whether Fort Ord was subject to exclusive federal authority, and to resolve that issue the Opinion had to and did determine whether Political Code Section 34 was a consent to the transfer of jurisdiction to the United States.

considers the wording of Government Code, Section 126 (App., pp. 101–103), the statute which in 1946 replaced Section 34 of the Political Code and which California contends is applicable to the land on which the purchases at Oakland were consummated. This consent statute specifically refers to Article I, Section 8, Clause 17 of the Constitution in defining the permissible purposes of the federal purchase; it requires the United States to assent to the acceptance of jurisdiction over the land involved; and it specifically reserves those aspects of its jurisdiction which it is unwilling to have pass to the United States pursuant to the federal constitution. The reference to the jurisdiction-conferring clause of the Constitution, the requirement of federal assent to an acceptance of jurisdiction, and the careful reservations of some aspects of State jurisdiction all show that this statute was intended to authorize a transfer of jurisdiction.

Finally, there would have been no reason for California to pass its consent-to-purchase statutes unless it was recognized that consent was necessary for the transfer of exclusive jurisdiction under Article I, Section 8, Clause 17. Appellants' attempt to explain the passage and reenactment of these "consent" statutes as necessary to *any* purchase of land under the Congressional Resolution of 1841 (5 Stat. 468) and its successor provisions—even without a transfer of jurisdiction—is totally ineffectual. As pointed out *supra*, pp. 28–29, n. 9, these provisions were plainly intended to require a transfer of jurisdiction, not to require a State's consent to a purchase even when jurisdiction did not pass to the United States. And

many years before the passage of the California consent statutes applicable to this case, this Court had plainly declared that the federal government has power to purchase or condemn land without the consent of the States. *Kohl* v. *United States*, 91 U.S. 367 (1875); see also *United States* v. *Stahl*, 27 Fed. Cas. 1288, No. 16,373 (C.C.D. Kan., 1868).

b. The claim that the power of "exclusive legislation" granted to Congress by Article I, Section 8, Clause 17 does not preclude the exercise of State legislative power.

California contends that the power of "exclusive legislation" over certain lands granted to Congress by the Constitution does not in itself prohibit the State from also legislating for these lands. Appellants' Brief, pp. 99–107, 133–139. As we have pointed out above, *supra*, pp. 32–33, this contention is in direct conflict with the words and purpose of the constitutional provision and has always been rejected by the Court. See also, *United States* v. *Bevans*, 3 Wheat. 336, 388; *Surplus Trading Co.* v. *Cook*, 281 U.S. 647, 652. It was flatly rejected by this Court in *Pacific Coast Dairy* v. *Dept. of Agriculture*, 318 U.S. 285, a case involving the very State legislation here in issue.[20]

[20] "When the Federal Government has acquired exclusive legislative jurisdiction over an area, by any of the three methods of acquiring such jurisdiction, it is clear that the State in which the area is located is without authority to legislate for the area or to enforce any of its laws within the area. All the powers of government with respect to the area are vested in the United States." *Report of the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States*, Part II, p. 169.

In *Pacific Coast Dairy, supra*, California attempted to regulate milk sales on federal enclaves indirectly by proscribing, in an amendment to its Milk Act, the handling of milk by distributors within the State for prospective sale at a point outside the jurisdiction of the State at less than the State-determined minimum prices. Its theory, approved by the California Supreme Court, *Pacific Coast Dairy v. Department of Agriculture*, 19 Cal. 2d 818, 123 P. 2d 442, was that a State has power to regulate matters within its jurisdiction, even though it will thereby materially influence transactions beyond its jurisdiction. The case involved sales consummated on Moffet Field, an area over which the United States had acquired exclusive jurisdiction by purchasing the lands with the consent of the State. 318 U.S. at 293.

This Court held that "sales consummated within the enclave cannot be regulated by the California [Milk Act]" because of the constitutional grant of "exclusive Legislation" respecting lands purchased by the United States with the consent of the State. 318 U.S. at 294. The Court flatly rejected California's argument that "a state is not disenabled from policing its own concerns, by the mere fact that its regulations may beget effects on those living beyond its borders" on the ground that "it is without application here, because of the authority granted the federal government over Moffet Field". 318 U.S. at 295.

The conclusion must be the same in the present case. Certainly no distinction is suggested by California's allegation that the milk purchased on a federal enclave at Castle is used on lands subject to State jurisdiction. (Appellants' Brief, p. 88.) Whether or not the land where this milk is resold or consumed is subject to State juridiction, the use of the milk by federal officials cannot be regulated by California. Therefore both the sale and the use of the milk at Castle, even on California's allegations, are as much a matter of exclusive federal concern as was true in *Pacific Coast Dairy, supra.*

c. The claim that California conditioned its consent to the purchase of land either on the filing of a plat or on the retention of concurrent legislative jurisdiction.

Appellants argue that certain State statutes "ceding" jurisdiction over land ceded, conveyed, or granted to the United States imposed conditions on the California statutes granting consent to the purchase of land in California by the United States.

(i) In particular, they contend that the tracts involved at Travis and Castle are not under exclusive federal jurisdiction, although purchased with the consent of the State legislature, because the United States admittedly did not comply with the requirement of a State "cession" statute that the State will not cede exclusive jurisdiction over lands "ceded or conveyed" to the United States unless the United States files a description and map of the lands with the county recorder. Appellants' Brief, pp. 107–116. As we have noted, above, *supra*, pp. 31–32, a State may in fact con-

dition its grant of consent to the federal purchase of land within its borders. However, it is clear beyond cavil that the California statutes requiring the filing of a plat were never intended to apply to lands purchased by the United States with the consent of the State legislature.

The United States can acquire exclusive jurisdiction over lands located in a State by purchasing the land with the consent of the State for one of the purposes specified in Article I, Section 8, Clause 17 of the United States Constitution. This is not, however, the only way in which the United States may obtain such jurisdiction. The State may cede jurisdiction to the United States over lands which the federal government has condemned or purchased without consent of the State or which have been obtained for some other purpose (*e.g.*, forest use) or in some other way (*e.g.*, by lease) than those specified in the Constitution. This latter method, cession of jurisdiction by act of the State, was first recognized in 1885 in *Fort Leavenworth Railroad Co.* v. *Lowe*, 114 U.S. 525. See, also, *James* v. *Dravo Contracting Co.*, 302 U.S. 134; *Collins* v. *Yosemite Park Co.*, 304 U.S. 518. California has had, since 1897, separate statutes dealing with each of these methods by which the United States may acquire exclusive jurisdiction over land within a State's borders. The requirement of filing a plat is found only in the statutes dealing with a cession of jurisdiction by act of the State—not in the statutes concerned with granting consent to a federal purchase of land with its attendant consequences under Article I of the United States Constitution. And

the only tracts of land involved in this case were acquired by Federal purchase with the consent of California pursuant to Article I, Section 8, Clause 17.

California adopted Political Code Section 34, in which the State consented to the purchase of lands by the United States for forts, etc., and, hence, effected a transfer of exclusive jurisdiction over lands so purchased, in 1872. In 1897, after the decision in *Fort Leavenworth Railroad Co.* v. *Lowe*, 114 U.S. 525, recognizing the validity of a cession of jurisdiction, it enacted its first cession statute (Chapter 56)[21] as a supplementary measure to enable the United States to obtain legislative jurisdiction over lands acquired without the consent of the State or otherwise without complying with the jurisdiction-conferring provisions of Article I, Section 8, Clause 17. From this history the Attorney General of California concluded (23 Ops. A.G. Cal. 14, 17):

> It is significant that Chapter 56 of the California Statutes of 1897 was enacted subsequent

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[21] Chapter 56, Cal. Stats. 1897, p. 51:

"Section 1. The State of California hereby cedes to the United States of America exclusive jurisdiction over all lands within this State now held, occupied, or reserved by the Government of the United States for military purposes or defense, or which may hereafter be ceded or conveyed to said United States for such purposes: *provided*, that a sufficient description by metes and bounds and a map or plat of such lands be filed in the proper office of record in the county in which the same are situated; *and provided further*, that this State reserves the right to serve and execute on said lands all civil process, no incompatible with this cession, and such criminal process as may lawfully issue under the authority of this State against any person or persons charged with crimes committed without said lands."

> to *Fort Leavenworth Railroad Co. v. Lowe*, *supra*, which was decided in 1885. It is reasonable to assume that the Legislature of this State, recognizing the second method by which jurisdiction may be transferred from the state to the federal government, enacted Chapter 56 of the California Statutes of 1897 to provide for this alternative method of transferring jurisdiction.

It is difficult, indeed, to disagree with his conclusion, for Chapter 56 nowhere refers to Political Code Section 34 or lands purchased by the United States with the consent of the State, but, by its own terms, limits its application to lands which "may hereafter be ceded or conveyed" to the United States. Moreover, the 1897 statute, Chapter 56, included, for the field of its application, a reservation of State jurisdiction to serve process which, being almost identical to that already found in the consent statute, could only have been thought necessary if, as is apparent from their wording, the two statutes applied to two quite different methods of relinquishing jurisdiction. Finally, the two statutes plainly had different fields of application. Consent was granted to federal purchases for any of the purposes listed in Article I, Section 8, Clause 17, of the Constitution ("erecting forts, magazines, arsenals, dockyards, and other needful buildings"). Jurisdiction was ceded, by act of the State, only if the land had been ceded or conveyed to the United States for military purposes.

Any possible ambiguity as to the divergent purposes of the two statutes was eliminated in 1939 when California amended Section 34 of the Political Code. See *supra*, p. 35, n. 13 for the text of the amended Section 34, applicable at the time of the purchase of Travis, Oakland and Castle. Paragraph one of the amended section consented to the purchase of lands within the State by the United States, subject to certain express reservations. Paragraph two provided that the same reservations provided for in paragraph one "in the case of the purchase or condemnation by the United State of any tract of land within this State shall * * * also be reserved to the State with respect to any tract of land over which any jurisdiction is ceded or granted by the State to the United States * * *" (Chapter 710, Cal. Stats. 1939, p. 2231) The Legislature of California there carefully distinguished between a relinquishment of jurisdiction by consent to a federal purchase of land and a cession of jurisdiction by act of the State. The latter method of ceding jurisdiction was provided for, by State statute, only in Chapter 56, the "cession" statute of 1897. It is therefore entirely clear that the function of the "cession" statute was to provide a method of ceding jurisdiction where land had *not* been purchased by the federal government in such a way as to bring Article I, Section 8, Clause 17 into effect. And the plot-filing requirement of the "cession" statute was, like the grant of jurisdiction it modified, only applicable where jurisdiction had *not* passed to the United States pursuant to Article I of the federal Constitution.

The cession and consent statutes were reenacted and

codified in 1943 after the purchase of the tracts involved in the present case.[22] Again the two different modes of transferring exclusive jurisdiction were treated separately by the State legislature. One, the consent-to-purchase method (Section 111), applied (a) to lands purchased by the United States, (b) for any of the purposes named in Article I, Section 8, Clause 17 of the federal constitution; and it specifically conditioned consent on a reservation of that jurisdiction which was to be retained by the State. The other,

[22]Government Code, Section 111, as set forth in California Statutes 1943, Chapter 134, page 898:

"The Legislature consents to the purchase or condemnation by the United States of any tract of land within the State for the purpose of erecting forts, magazines, arsenals, dockyards, and other needful buildings, reserving the authority to serve and execute process and the State's entire power of taxation as provided in this article."

* * * * * * *

Government Code, Section 113, as set forth in California Statutes 1943, Chapter 134, page 898:

"The State cedes to the United States exclusive jurisdiction over such land as has been or may be ceded or conveyed to the United States, during the time the United States is the owner thereof, reserving the administration of the criminal law of the State, the authority to serve and execute process and the State's entire power of taxation."

Government Code, Section 114, as set forth in California Statutes 1943, Chapter 134, pages 898-899:

"The State cedes to the United States exclusive jurisdiction over all lands within the State held, occupied, or reserved on March 2, 1897 by the United States for military purposes or defense, and over all land which thereafter has been or which may be ceded or conveyed to the United States for such purposes reserving the authority to serve and execute process, and the State's entire power of taxation. A sufficient description by metes and bounds and a map or plat of the lands shall first be filed in the proper office of record in the county in which the lands are situated."

the "cession" method (Sections 113, 114), applied (a) to lands ceded or conveyed to the United States, (b) for military or defense purposes; and it included a reservation of jurisdiction identical to that already present in the "consent-to-purchase" statutes and required the filing of a plat. It is plain on the face of the statutes that the statutory requirement of filing a plat applied only to the "cession" method of transferring jurisdiction and not to the consent-to-purchase method.

The conclusion is inescapable that California's "cession" statutes were never intended to limit or modify the State's "consent-to-purchase" statutes, but were meant to add a new method of relinquishing jurisdiction to the federal government. Therefore, in order to acquire exclusive jurisdiction by the separate purchase-with-consent method, the United States did not have to comply with the filing provisions of the cession statute. The California Attorney General has previously recognized this clear distinction in 23 Ops. A.G. Cal. 14. The same conclusion was reached in the *Report of the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States*, Part I, p. 28.

(ii) Although it appears clear that the United States had obtained exclusive jurisdiction over the relevant land at Oakland long before California modified its "consent-to-purchase" law in 1946 (Govt. Code Section 126) (*supra*, pp. 38–39), California also contends at length that the 1946 statute, which reserved the application of all conditions on consent imposed by other laws, made applicable to the purchase of land

at Oakland the provisions of Government Code, Section 113, quoted *supra*, n. 22. Appellant's Brief pp. 139–148. Appellant's position is erroneous even on its contrary-to-fact assumption. Section 113 reserved "the administration of the criminal law of the State" only from that jurisdiction which it otherwise "cedes" to the United States. As we have shown, *supra*, pp. 50–52, Section 133 is a "cession" statute and its provisions, by its own terms, the history of its enactment, and prior decisions of the Attorney General of California, only apply to lands conveyed to the United States over which jurisdiction has been "ceded" by act of the State. They do not apply to lands, such as are involved at Oakland, which were purchased with the consent of the State and are within the express mandate of Article 1, Section 8, Clause 17 of the Constitution.

d. The claim that California's Milk Act was assimilated as federal law on Oakland, Castle, and Travis.

Appellants argue alternatively that the Milk Act and the administratively determined minimum price regulations were assimilated as federal law on Oakland, Castle and Travis because these installations were acquired after the enactment of the Milk Act, citing *Pacific Coast Dairy* v. *Department of Agriculture*, 318 U.S. 285, 294. Appellant's Brief, pp. 120–124.

In making this contention, appellants do not rely upon the Assimilative Crimes Act of 1948, 62 Stat. 686, 18 U.S.C. (1952 ed.) 13 which makes applicable appropriate provisions of State law in force at the time of the act or omission. Reliance on this federal

statute would be of no avail to State officials, for, even if a State price regulation were assimilated as federal law, federal enforcement officials, and not the appellants, would be responsible for prosecuting violations of the federal statute on the enclaves. See *Johnson* v. *Yellow Cab Co.*, 321 U.S. 383, 392–393.

Speaking of an earlier Assimilative Crimes Act, the Court said (*Puerto Rico* v. *Shell Co.*, 302 U.S. 253, 266):

> Prosecutions under that section, however, are not to enforce the laws of the state, territory or district, but to enforce the federal law, the details of which, instead of being recited, are adopted by reference.

For this reason the *Report of the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States* concluded, as to the present Assimilative Crimes Act, that (Part I, p. 17) "Law enforcement must, of course, be supplied by the Federal Government since, the State law being inapplicable within the enclave, local policemen and other law-enforcement agencies do not have authority nor do the State courts have criminal jurisdiction over offenses committed within the reservation."[23]

Appellants place their exclusive reliance upon the rule—originally of international law—assimilating for a ceded territory the civil laws of a former sovereign.

[23] Moreover, "No reported judicial decision appears to exist upholding the effectiveness, under the Assimilative Crimes Act, of a primarily regulatory statute containing criminal provisions." *Report of the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States*, Part II, p. 138.

The rule was first made applicable to State law in federal enclaves in *Chicago, Rock Island & Pacific Railway* v. *McGlinn*, 114 U.S. 542. This Court has, however, repeatedly held that because a State cannot legislate with respect to a federal enclave unless it specifically reserved that right when it consented to the purchase of the lands by the United States, only the State law as it existed at the time of the acquisition is assimilated, and not subsequent amendments to that law. *Arlington Hotel Co.* v. *Fant*, 278 U.S. 439; *James Stewart & Co.* v. *Sadrakula*, 309 U.S. 94, 99–101, *Pacific Coast Dairy* v. *Department of Agriculture*, 318 U.S. 285, 294; see *Report of the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States*, Part II, pp. 158–159. Since there is no issue in the present case as to the applicability of State law as it existed at the time the United States obtained exclusive jurisdiction of the tracts in question—California is seeking to enforce its current regulatory scheme and not the price regulations as set out at the time of purchase of the land—the question whether California's earlier Milk Act was assimilated is not involved in the present case.[24]

[24] In any event, State law can have no effect in a federal enclave if it conflicts with federal policy. *Pacific Coast Dairy* v. *Department of Agriculture*, *supra*; *Murray* v. *Gerrick & Co.*, 291 U.S. 315, 318–320; *Chicago, Rock Island, & Pacific Railway Co.* v. *McGlinn*, 114 U.S. 542, 546. As we shall develop below, it is our position that the Milk Act is in direct conflict with the federal policy of purchasing on a competitive basis—insofar as sales directly to the government are concerned—and, as applied to federal enclaves, invades an area of regulation which has already been occupied by the Armed Services Procurement Act and the regulations thereunder.

e. The claim that property acquired by the War Department was subject to the restrictions the Lanham Act imposed upon property acquired by the National Housing Agency

Finally, with respect to Castle, appellants point to the fact that the United States originally secured *possession* of Tract A in 1942 to construct emergency civilian war housing under the Lanham Act, 42 U.S.C. 1521, *et seq.* Appellants' Brief pp. 116–120. Section 10 of the Lanham Act provided that the acquisition of real property by the Administrator of the National Housing Agency would not deprive any State of civil or criminal jurisdiction over property acquired pursuant to that Act. Jurisdiction over Tract A, however, was transferred to the War Department in 1942,[23] and when title to the property was acquired in 1943, the acquisition was not by the Administrator of the National Housing Agency but by the War Department.

Appellants insist that the provision of Section 10 of the Lanham Act, preventing the United States from acquiring exclusive jurisdiction over property obtained under that Act, permanently "attached" to Tract A so that, even though it was subsequently purchased by the War Department with the consent

[23] This transfer of jurisdiction was made pursuant to Section 4 of the Lanham Act, 56 Stat. 12:

"*Provided, further*, That the Administrator may, in his discretion, upon the request of the Secretaries of War or Navy transfer to the jurisdiction of the War or Navy Departments such housing constructed under the provisions of this Act as may be considered to be permanently useful to the Army or Navy."

of California and for the purposes enumerated in Article I, Section 8, Clause 17 of the Constitution, the United States did not acquire exclusive jurisdiction over the tract. It is clear that when jurisdiction over Tract A was permanently transferred to the War Department for use as an integral part of the national defense system, the restrictions and provisions of the Lanham Act governing the use of the land were no longer applicable.[26] The court below correctly disposed of this argument too (R. 572):

> We are of the opinion, however, that after the transfer of Tract A from the National Housing Administrator to the War Department, pursuant to 42 U.S.C. Section 1524, for military purposes, statutory provisions of the Lanham Act, including Section 10, became inapplicable to the land. The War Department would not be subject to statutory provisions pertinent only to lands held by the National Housing Agency for Lanham Act purposes. Upon its acquisition of Tract A for its own military purposes the War Department held it subject only to statutes pertinent to its own powers and purposes.

[26] Appellant's interpretation (Br. 116) of the Opinion of the Army Corps of Engineers (R. 380–381) as expressing the view that California exercises jurisdiction over Parcel A by virtue of the restrictions in the Lanham Act is inaccurate. That opinion recognized that the Judge Advocate General had determined that "upon transfer of such lands to the Department of the Army, the limitations in Section 10 do not apply." The Opinion concluded, erroneously, that "jurisdiction over this area has not been accepted for the United States." As we have shown, *supra*, p. 37, the United States did consent to a transfer of exclusive jurisdiction over Tract A to the Federal government.

III

THE CALIFORNIA PRICE-FIXING STATUTES ARE INCONSISTENT WITH THE FEDERAL STATUTES AND REGULATIONS GOVERNING PROCUREMENT OF MILK PRODUCTS AND CANNOT BE CONSTITUTIONALLY APPLIED TO CONTRACTS OF THE UNITED STATES FOR MILK SUPPLIES

If, as we contend, the district court was correct in its holding as to the existence and effect of exclusive federal jurisdiction on the relevant tracts, at Travis, Castle, and Oakland, then California is without power to regulate any sales taking place on these tracts regardless of who is the buyer. Even if the district court were wrong in its basic holding, we contend and the district court found that California can not regulate the sale of milk—on or off these installations—to officials of the military departments when the purchase price comes from appropriated funds and when, therefore, the federal policy embodied in the federal procurement statutes and regulations is in effect. Regulation of the price the government must pay from appropriated funds for milk conflicts with the federal procurement policy of free bargaining in a competitive context and therefore must fail under the Supremacy Clause.[27]

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[27] On this aspect of the case we shall restrict our argument, as the district court restricted its holding, to purchases made for direct use by the federal government (*e.g.*, mess hall consumption) and to purchases for resale at commissaries. See 190 F. Supp. 645. Only purchases for these purposes have been shown on the present record to be made from appropriated funds.

A. THIS COURT'S DECISION IN PUBLIC UTILITIES COMMISSION OF CALIFORNIA V. UNITED STATES, 355 U.S. 534, CONTROLS THE PRESENT CASE

In *Public Utilities Commission of California v. United States*, 355 U.S. 534, 544, this Court held that the conflict between a federal policy of free negotiation for advantageous rates and a State policy of regulation of minimum rates was "as clear as any that the Supremacy Clause, Art. VI, cl. 2, of the Constitution was designed to resolve" and that therefore State rate regulation could not be applied to federal procurement of transportation services. It is our belief that an identical conflict exists in the present case and must be resolved in the same way.

Here, as in the *Public Utilities* case, California has established detailed procedures for the regulation of the price to be charged to and paid by the United States. The California Milk Act authorizes the Director of Agriculture to prescribe minimum wholesale prices and minimum retail prices. Cal. Agric. Code 4351, 4352. Minimum wholesale prices are defined as including the "prices at which fluid milk or fluid cream shall be sold by distributors to retail stores, restaurants, confectioneries and other places for consumption on the premises * * *." Cal. Agric. Code, Section 4352, App. 95. Minimum retail prices mean prices at which fluid milk is sold by distributors and retail stores to consumers. Cal. Agric. Code, Section 4353, App. 96. The Code provides that "No distributor shall sell to any retail store, restaurant, confectionery, or other place for consumption on or off the premises, or to any consumer" and, in the fol-

lowing clause, that none of these "shall purchase from any distributor * * * at less than the prices as established by the director. * * *" Cal. Agric. Code, Section 4361, App. 96. Criminal and civil penalties are provided for the violation of these provisions. Cal. Agric. Code, Section 4410, App. 97.

Pursuant to delegated authority, the Director of Agriculture has promulgated minimum prices at which distributors can sell to retail stores, restaurants, confectioneries, and other places for consumption on the premises, for the marketing areas encompassing Travis, Castle and Oakland. And as the record in this case shows, these regulations were enforced with respect to sales to the United States, with the result that competition for government supply contracts was eliminated and almost all bids were at the State imposed minimum prices. It is fair to conclude that this State price regulation is at least as rigorous as that involved in the *Public Utilities* case.[28]

Under the holding of *Public Utilities Commission of California* v. *United States, supra,* State price regulation, such as this, cannot be applied to the United States in the face of a federal procurement

[28] In the *Public Utilities* case, California required that applicable transportation rates be filed by each common carrier and that no carrier "shall charge, demand, collect, or receive a different compensation for the transportation of persons or property * * * than the applicable rates * * * specified in its schedules filed. * * *" 355 U.S. at 538. Although, by special provision, the California commission could "permit common carriers to transport property *at reduced rates for the United States*" (355 U.S. at 535), the Court found that the State regulatory scheme unmistakably asserted the State's power to set rates in government transportation contracts.

policy which provides in detail for a method of purchase intended to assure that the United States obtains the benefit of competition among and free bargaining with private sellers of goods or services. The crux of the "conflict" question in the present case is, therefore, whether the federal statutory and regulatory policy with regard to the procurement of milk differs in any significant respect from that determined in the *Public Utilities* case with respect to the procurement of transportation services. A comparison of the statutes and regulations relating to milk and transportation reveals that there is no such difference in federal policy which could justify a different result in the present case.

In the *Public Utilities Commission* case this Court ruled that the interlocking federal statutes and regulations governing procurement of transportation services were intended to be, not merely a set of recommended procedures for federal officials for dealing within the context of State customs and laws, but a pervasive and uniform procedural framework for the federal purchase of goods and services regardless of conflicting State laws. The Court found that in the controlling statutes "Congress has provided a comprehensive policy governing procurement" (*id.* at 540) with competitive bidding the general rule and negotiated purchase or contract the exception which was to be available in several enumerated situations. In the more specific regulations "promulgated to carry out these statutory provisions" (*id.* at 542) in the field of transportation the Court noted three indications that the federal procurement procedures were

intended to provide an exclusive framework for the procurement of transportation without regard to State law: (1) provision for the determination by federal officers of the reasonableness of current rates and, "when appropriate, for negotiation of adjusted or modified rates" (*id.* at 542); (2) declarations that the *least costly* adequate means of transportation will be chosen; and (3) stipulations requiring negotiation for lower or more equitable rates whenever currently effective rates were determined to be unreasonable or excessive.

From these statutes and regulations the Court concluded that the federal procurement policy was one of free contracting designed to secure for the United States those benefits of lower cost and higher quality which the government might be able to obtain by negotiation or other forms of bargaining.

The statutes in effect at the time of the *Public Utilities* case are still the basic provisions for all procurement of supplies and services by the armed services and, as we shall show, the underlying regulations involved here are directed to the same end—procurement at the lowest overall cost to the government. See 70A Stat. 127–133, 10 U.S.C. 2301–2314. The statutes require that contracts will be placed by competitive bidding, in which event the award is to be granted "to the responsible bidder whose bid * * * will be the most advantageous to the United States, price and other factors considered." 10 U.S.C. 2305(c), App. B, p. 105. The only exception to this rule is that procurement may also be carried out by negotiation without advertising in certain specified situations including, among others, where it is impracticable to ob-

tain competition, where bid prices are determined to be unreasonable or not to have been reached independently in open competition,[29] where the purchase is for property for authorized resale, and where the purchase is for perishable subsistence supplies, 10 U.S.C. 2304(a) (10), (15); (8), (9), App. B, p. 104; see *Public Utilities Commision of California* v. *United States, supra,* 355 U.S. at 540–541 and n. 3.

The regulations in the *Public Utilities Commission* case differ from those involved here in that they were concerned solely with transportation. They differ also in that, while the regulations considered in the *Public Utilities* case were viewed as emphasizing free bargaining by procurement officers, the regulations applicable to milk procurement emphasize not only the freedom of procurement officers to bargain for acceptable prices, but also the competitive context which must be brought to bear on any purchase of milk with federal funds, whether the purchase is made by negotiation or by advertising for bids. Except for this explicit emphasis on use of the forces of competition—a factor which makes it even clearer that the federal policy is incompatible with State regulation of the

[29] As stated in the Senate Report on the Armed Services Procurement Act of 1947, the purpose of this provision was "to break collusive bidding, follow-the-leader pricing, rotated low bids, identical bids requiring drawing of lots, uniform estimating systems, refusal to classify the Government as other than a retail buyer regardless of the quantity purchased, and similar practices." S. Rep. 571, 80th Cong., 1st Sess., p. 4. The present military procurement statute is a recodification, without substantial change, of the Armed Services Procurement Act of 1947. See, S. Rep. 2484, 80th Cong., 2d Sess., pp. 19, 20–21.

prices—there is no difference in either the scope or the fundamental aim of the regulations found in the *Public Utilities* case and those applicable here.

The Armed Services Procurement Regulations applicable to the procurement of milk with appropriated funds speak with unusual clarity of the purpose to obtain the lowest overall price through the use of techniques designed to secure for the United States the benefits of competition among vendors. "It is the policy of the Department of Defense to procure supplies and services from responsible sources at fair and reasonable prices calculated to result in the lowest ultimate over-all cost of the Government." ASPR 3-801.1, App. C, p. 109. That method of procurement shall be used "which will be most advantageous to the Government—price, quality, and other factors considered."[30] ASPR 1-301, App. C, p. 106. "Such procurement shall be made on a competitive basis, whether by formal advertising or by negotiation, to the maximum practicable extent * * *." *Ibid.* Whichever method is used, "competitive proposals * * * shall be solicited from all such qualified sources of supplies or services as are deemed necessary by the contracting officer to assure such full and free competition as * * * to obtain for the Government the most advantageous contract—price,

[30] Because of the positively expressed Congressional intent that all procurement shall be by competitive bidding, the Air Force policy is to use advertising procedures whenever possible, notwithstanding the authority to negotiate for perishable subsistence supplies in 10 U.S.C. 2304(c)(9). Air Force Procurement Regulation 2-102, App. C, pp. 112-114.

quality, and other factors considered." ASPR 1.302.2, App. C, p. 106.

If procurement is effected by advertising for bids, the contract is to be awarded "to the lowest responsible bidder." ASPR 1–301, App. C, p. 106. Moreover, "[t]he fact that a procurement is to be negotiated," rather than handled by advertising for bids, "does not relax the requirements for competition." See Army Procurement Procedure, 3–101, App. C, p. 110. Even in the case of negotiation, price quotations are to be obtained from enough suppliers "to assure full and free competition * * * to the end that procurement will be made to the best advantage of the Government * * *." ASPR 3–101, App. C, p. 107. Twenty separate considerations are to go into the selection of a supplier in cases of negotiated procurement. The first of these, as in the case of procurement by advertising for bids, is a "comparison of prices quoted." *Ibid.* Finally, the service regulations make entirely clear that when procurement by negotiation is undertaken the contracting officers have complete discretion to "bargain with any number of interested suppliers" and to conduct "separate negotiations * * * with any source of supply" in any way and to any extent thought necessary "to the end that maximum pricing benefits from all negotiated transactions may be realized." See, Army Procurement Procedure, Paragraph 3–101(b), App. C, p. 110.

There is no room for doubt that the federal procurement policy is bottomed upon a belief in the necessity of "full and free competition" and free

bargaining in order that the federal government may obtain the services and supplies it needs at the lowest over-all cost to the United States. Here, moreover, as in the *Public Utilities* case, "It seems clear that these regulations * * * sanction the policy of negotiating rates * * * and entrust the procurement officers with the discretion to determine when existing rates will be accepted and when negotiation for lower rates will be undertaken." 355 U.S. at 542–543. Indeed, the regulations go beyond authorizing procurement officers to bargain freely for lower rates. The regulations specify that such negotiations or, wherever possible, advertising for bids shall be conducted in a context of active competition to obtain for the United States the most advantageous contract.

The conflict between California's system of price regulation and the federal procurement system is clear. The federal scheme directs procurement officers to purchase at the lowest ultimate over-all cost to the government; it requires that purchases be made by competitive bidding to the maximum practicable extent; and it establishes comprehensive procedures governing the details of procurement of supplies by either negotiation or formal advertising to assure that procurement officers bring the effect of competition to bear on the other contracting party. The California statute, as experience has shown, effectively eliminates competition. It forces federal officers to procure supplies not at the lowest cost to the United States, but at a price determined by a State administrator on the basis of factors not specified in the federal procurement law. And where the

supply contract is negotiated because "it is impracticable to obtain competition," it is the State agency, and not the federal officer, who determines the price term of the contract. In sum, the conflict in the instant case is fully as acute as that presented in *Public Utilities Commission* v. *United States*, 355 U.S. 534. Here, as in that case, "the conflict between the federal policy of negotiated rates and the state policy of regulation of negotiated rates" is "as clear as any that the Supremacy Clause, Art. VI, cl. 2, of the Constitution was designed to resolve." 355 U.S. at 544.[31]

B. APPELLANTS' CONTENTIONS

Two arguments advanced by appellants against the force of the *Public Utilities* decision deserve separate consideration.

(1) First, appellants contend that the "conflict" issue in the present case has already been determined by the Court in *Penn Dairies, Inc.* v. *Milk Control Commission*, 318 U.S. 261. However, *Penn Dairies* involved the consideration of federal statutes and reg-

[31] Indeed, in one significant sense the conflict between federal and state regulation of milk procurement is even clearer here than was the conflict in the *Public Utilities* case, for the scheme of federal regulation is far more comprehensive. The United States has undertaken to regulate not only the method of determining the price at which it will purchase milk, but also the quality of the product it purchases. Thus, bids are only mailed to distributors which have been approved, after sanitation inspection, by the Army or Air Force (R. 246, 248), and the standard procurement contracts provide for the testing of milk supplies and periodical inspection of the distributor's plants. (R. 41, 80, 115, 124, 244, 269, 270). No room is left for the play of State law even in the determination of the quality of milk sold to the United States.

ulations different from those applicable either in this case or in *Public Utilities Commission of California* v. *United States*. 355 U.S. 534. It was therefore held not to control the *Public Utilities* case, and it cannot control this litigation.

In *Penn Dairies*, the Court analyzed the early procurement statutes and regulations there applicable, and found no conflict with Pennsylvania's laws fixing the price of milk sold to the government. Since that decision Congress has passed what the House of Representatives report called "a comprehensive revision and restatement of the law governing the procurement of supplies and services." H. Rep. 109, 80th Cong., 1st Sess., p. 6. See also S. Rep. 571, 80th Cong., 1st Sess., p. 2. The new statute "holds to the time-tested method of competitive bidding," *ibid.*, and provides that procurement will be made on terms most advantageous to the United States.

Of greater importance is the fact that the regulations in force at the time of the *Penn Dairies* decision manifested a procurement policy directly opposed to that which infuses the present regulations.[32] The earlier regulations stated that supplies might be purchased on the open market where it was "impracticable to secure competition." They then expressly ruled that it was "impracticable to secure competition" where the price was fixed by State authority. The Court regarded this as "a clear indication that state price regulations were not thought to be inappli-

[32] These regulations have, of course, the force of law. *Public Utilities Commission of California* v. *United States*, 355 U.S. 534, 542-543; *Leslie Miller, Inc.* v. *Arkansas*, 352 U.S. 187; *Standard Oil Co.* v. *Johnson*, 316 U.S. 481.

cable to sales under Army contracts." 318 U.S. at 277. The regulations further specified that federal contracting officers should not require suppliers to comply with local price regulations *before it was judicially determined whether such regulations were applicable to government contracts*, a requirement so limited by its own terms that the Court viewed it as manifesting a "hands off" policy respecting minimum milk price laws. 318 U.S. at 276–277.

The present regulations make no such allowances, but instead command unqualifiedly that purchases must be made on a competitive basis. While the federal statute does authorize negotiation where it is impracticable to secure competition (10 U.S.C. 2304(a)(10)), the regulations make it clear that any such negotiation is to be conducted on a competitive basis to the maximum practicable extent, and in accordance with the expressed federal policy of purchasing at the lowest ultimate over-all cost to the government, ASPR 3-101, 3-801, App. C, pp. 107–110. The differing policies manifested by these two sets of statutes and regulations provide the fundamental distinction between the *Penn Dairies* case and this Court's later decision in *Public Utilities Commission of California, supra*. Since the policy of the federal statute and regulations involved here is substantially identical to that involved in *Public Utilities Commission*, the result in that case is controlling here.

2. Appellants' second contention is that, whatever the federal policy may be as to purchases for mess-hall consumption, in the case of milk purchases for resale at commissaries there is no federal policy

favoring negotiation or competition in order to obtain the lowest possible prices. Appellants rely, in support of this argument: (a) on appropriation acts indicating that base commissaries are considered unnecessary where private stores selling similar products at a reasonable price are located within a manageable distance and requiring that commissaries sell at a price sufficient to cover the cost of the goods sold; and (b) on federal statutes and regulations exempting purchases for resale from the requirements of procurement by advertising for bids.

The United States recognizes that the considerations which must be evaluated in determining the federal policy with respect to purchases for resale in commissaries are, in some material respects, different from those involved in purchases of services or supplies for direct use or consumption by the federal government. But, while these differences make the issue of a conflict between federal and State policies a more difficult one when purchases for commissaries are involved, they do not, in our view, require a different result.

Purchases by the United States for resale at post commissaries are made from appropriated funds (R. 515, 516, 538–539; see 75 Stat. 377) by federal procurement officers acting under the directives of the federal procurement law.[33] And neither the statutes nor the regulations exempt purchases for commissary

[33] There can be no dispute that commissaries are integral parts of the Defense Department, that they share in the fulfillment of the duties entrusted to that Department, and that they partake of whatever immunities it may have under the Constitution and federal statutes. See *Standard Oil Co.* v. *Johnson*, 316 U.S. 481.

se from the policies of free contracting in a competitive setting which they enunciate.

It is true that the statute provides that, where an item is purchased for resale, it *may* be procured by negotiation rather than by formal advertising (10 U.S.C. 2304(a)(8)) and that this provision was inserted because purchases for commissaries are generally made by brand name rather than by specification. S. Rep. 571, 80th Cong., 1st Sess., p. 7. This however, does not support an inference that commissary purchases are never governed by the federal policy of purchasing at the lowest ultimate over-all cost to the United States. To the contrary, the statutory exception to formal advertising is merely permissive—the agency head "may" negotiate—and the armed forces are therefore free to purchase, by formal advertising, from the responsible bidder whose bid "will be the most advantageous to the United States." 10 U.S.C. 2305(c). That negotiation shall *not* be used unless the facts and circumstances making advertised bidding impractical are clear and convincing is a mandate of the federal procurement policy. See, Air Force Procurement Regulations, Paragraph 2-102, App. C, p. 112. Thus milk products have been purchased on a competitive-bid basis at each of the three installations presently in issue, and there can be no question that this use of free competition to obtain favorable terms is expressly authorized by federal law. Indeed, the issue would be no different if milk contracts were customarily negotiated, for the regulations provide, without exception, that the federal policy of purchasing in a competitive context at the

lowest cost to the United States is applicable to all procurement which is effectuated by negotiation. ASPR 1-301, 3-801.1, App. C, pp. 106, 109-110.

The conflict between these federal statutes and regulations authorizing the use of competitive bidding and negotiation to obtain the lowest over-all price for milk intended for resale at commissaries and the application of California's Milk Act to commissary purchases is, in all material respects, the same as that involved in the *Public Utilities* case. Accordingly, the State act must give way unless the promulgation of these federal regulations was unauthorized. We do not believe that serious doubt is cast upon the validity of these regulations by the provisions of recent authorization acts declaring that commissaries must reimburse the service appropriation for any appropriated funds used to purchase operating supplies and that no appropriation shall be used to assist commissaries if the items sold can be obtained elsewhere at a reasonable distance and a reasonable price. See, *e.g.*, 75 Stat. 377.

That commissaries are to be run on a self-sufficient basis so that the cost of products sold is met by the price charged establishes, it is true, that any savings in the cost of milk will accrue to the commissary purchasers and not to the federal Treasury. It does not, however, establish that there was no authority to make the general procurement regulations applicable to commissary sales in order to realize savings for military-connected personnel. Indeed, the applicability of the federal regulations to commissary sales is all but required by federal statute. Congress itself

had authorized the payment for commissary supplies from appropriated funds. See, *e.g.*, 75 Stat. 377. And the federal statutes dealing with military procurement and declaring the federal policies of free competition and free bargaining are expressly made applicable to all purchases "for which payment is to be made from appropriated funds." 10 U.S.C. § 2303.

Finally, the fact the Congress sees no justification for paying for commissaries where the same items can be purchased at a reasonable price within a reasonable distance bears, at best, tangentially upon the desirability of allowing those commissaries which satisfy the statutory criteria of economic isolation to enjoy and pass on to their customers the benefits of open competition and free negotiation. A clearer statement of Congressional policy than that which has been given in the appropriations acts should be necessary to invalidate regulations embodying the substance of a statutory policy which is made expressly applicable to *all* purchases "for which payment is to be made with appropriated funds." 10 U.S.C. 2303.

IV

TO APPLY THE CALIFORNIA PRICE REGULATION TO U.S. MILK CONTRACTS OF THE UNITED STATES WOULD DIRECTLY, AND THEREFORE UNCONSTITUTIONALLY, REGULATE AND BURDEN THE OPERATIONS OF THE FEDERAL GOVERNMENT

The complaints allege that, quite apart from the federal statutes and regulations, the California price regulation is unconstitutional because it violates the United States' inherent constitutional immunity from

State regulation (R. 11, 181). In analyzing this claim, which we earnestly renew, it is essential to observe the exact limits of the constitutional question. The United States indubitably has some degree of sovereign immunity from both State taxation and State regulation as "an unavoidable consequence of that supremacy which the constitution has declared." *McCulloch* v. *Maryland*, 4 Wheat. 316, 436. Congress may define its operative limits, either by waiving any part of the immunity that would otherwise exist (see *Mayo* v *United States*, 319 U.S. 441, 448), or by ousting State-imposed burdens that unduly hamper the effectuation of federal policies (*Federal Land Bank* v. *Kiowa County*, 368 U.S. 146, 149 and cases cited). When neither Congress nor its authorized delegates in the executive branch have spoken, as we now assume to be the case, it is for the Court to determine what rule shall prevail until Congress expresses a policy. The task is not unlike that of determining how far a State may regulate or tax interstate commerce in the silence of Congress.

Two rules for dealing with this situation have come to be settled:

First, a State may not directly regulate or tax the property, instrumentalities or activities of the United States. *Johnson* v. *Maryland*, 254 U.S. 51; *Arizona* v. *California*, 283 U.S. 423; *Van Brocklin* v. *Tennessee*, 117 U.S. 151; *Mayo* v. *United States*, 319 U.S. 441; see *Penn Dairies* v. *Milk Control Comm.*, 318 U.S. 261.

Second, the fact that nondiscriminatory State taxation or regulation of one doing business with the

federal government imposes an increased economic burden upon the United States is not alone enough to give the contractor immunity from the taxation or regulation. *James* v. *Dravo Contracting Co.*, 302 U.S. 134; *Alabama* v. *King & Boozer*, 314 U.S. 1; *United States* v. *City of Detroit*, 355 U.S. 466; *James Stewart & Co.* v. *Sadrakula*, 309 U.S. 94.

While the boundary dividing the spheres of application of each of these rules may not be clear in every case, one subsidiary proposition is both easily applied and firmly established. A State may neither address a command to, nor impose a tax upon, the agents and officers of the United States when they are acting in the course of their constitutional powers. This constitutional mandate has been plainly disregarded in the present case, for the California statutes are, as applied by the State to military purchases, a direct regulation addressed to the federal government as a purchaser and retailer.

The minimum distributor prices are fixed by the Director of Agriculture, and for the United States to purchase milk from distributors at less than the prices established by the Director is a violation of Cal. Agric. Code, Section 4361.

> No distributor shall sell to any retail store, restaurant, confectionery or other place for consumption on or off the premises, or to any consumer, and *no* retail store, restaurant, confectionery or other *place for consumption on or off the premises, shall purchase* from any distributor or sell to any consumer, any fluid milk or fluid cream, or either of them, at less than the prices as established by the director

under the provisions of this article * * *." [Emphasis added.]

The prohibition of purchases by a "place for consumption on or off the premises" must include purchases by the United States at the military installations here involved, for the prohibition (in the same sentence) of sales to a "place for consumption on or off the premises" is relied upon by California to prohibit distributors from selling to the United States at prices less than the State imposed minimums. (See R. 152, 751–753, 791–793.)[34] A violation of Section 4361, or of any other provision of the Act or any order of the Director establishing minimum wholesale prices, is a misdemeanor and is also punishable by civil fine. Cal. Agric. Code 4410.

Thus, here, as in *Public Utilities Commission of California* v. *United States*, 355 U.S. 534, 538, "If a United States officer were to [contract] with a [distributor] for 'reduced rates' * * * he could be thrown

[34] Moreover, the Director of Agriculture is without authority to prescribe minimum prices with respect to sales between distributors and the United States unless the United States is included within the meaning of the phrase "any * * * place for consumption on or off the premises." The Director is authorized to prescribe minimum wholesale (distributor) prices by Section 4350, and Section 4352 limits this authority to the "prices at which fluid milk * * * shall be sold by distributors to retail stores including the prices at which fluid milk * * * shall be sold by distributors to retail stores, restaurants, confectioneries and other places for consumption on the premises * * *."

Pacific Coast Dairy v. *Department of Agriculture*, 19 Cal. 2d 818, 830, 123 P. 2d 442, 449, reversed, 318 U.S. 285, which neither considered nor even mentioned the prohibitions on buyers in what is now Section 4361, cannot be considered an authoritative holding that the Milk Act's prohibitions are inapplicable against federal officers.

into the county jail." This circumstance distinguishes *Penn Dairies* v. *Milk Control Commission*, 318 U.S. 261, where, as the case came before the Court, the State regulation imposed no penalty or prohibition on the federal government or its officers; they, Mr. Chief Justice Stone said, "may purchase milk from whom and at what price they will, without incurring any penalty" (318 U.S. at 270).[35]

We do not stand upon that ground alone. Defining the boundary line between direct regulation or taxation of the United States and taxation or regulation of one doing business with the United States involves recognition of the fact that a State may attempt to tax or regulate the activities of the federal government without verbally addressing its commands to a class including the United States or its agents. It is the activities of the United States and not merely its agents that must be free from State interference. Included among those activities is the federal government's exercise of its powers to contract. Accordingly, we submit that a State may not regulate the terms of a transaction by which the United States obtains services or supplies.[36]

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[35] Appellants argue that the Court should disregard the plain meaning and effect of Section 4361—that is, making it unlawful for a federal officer to purchase milk below the State minimum prices—because California has not yet made any attempt to enforce the penal provisions of the act against federal officers. A similar disclaimer of an intent to disregard the penal provisions of the Public Utilities Code was rejected by the Court in *Public Utilities Commission of California* v. *United States*, 355 U.S. 534, 536, 538, 550.

[36] In *United States and Olin Mathieson Chemical Corp.* v. *Department of Revenue of the State of Illinois*, No. 235, this

This proposition may be fitted into the basic principles stated above in either of two ways. One formulation would recognize that in determining whether an attempted State regulation of the terms of a contract is a "direct" regulation of the United States, it is immaterial whether the regulation of the terms of a contract involves the addressing of a command to some class of which federal officials are members or takes the form of a prohibition on the activities of the sellers of goods or services. In determining what is "direct," in defining the immunity, this Court "goes beyond the bare face of the statute to consider all relevant circumstances." *United States* v. *City of Detroit*, 355 U.S. 466, 469. And to regulate the terms of transactions into which contractors may enter with the United States is, inevitably and directly, to regulate the government itself.

Alternatively, one might reserve the first principle—banning direct taxation and regulation of the United States, its property and activities—for cases in which the legislation is addressed *in haec verba* to the United States or a class of which it is a member. In this event, that principle and the rule denying immunity where the State statute is not addressed to the United States and imposes only an indirect burden upon the United States do not form a dichotomy dividing the universe; they leave room for a third class of cases in which the State statute, although not for-

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Term, Jurisdictional Statement filed July, 1962, challenging the constitutionality of an Illinois tax upon sales made to the United States, we deal with the parallel tax aspects of this question.

mally addressed to the United States or its agents, nevertheless imposes more than the kind of indirect economic burden with which the latter rule is concerned. The present case would then fall within the intermediate area, to be governed by a separate rule exempting the contracts of the United States from *direct* regulation without regard to the form of words.

In either event, the immunity is supported both by the prior decisions of this Court and by the reasons underlying the prohibition against State regulation or taxation addressed to the federal government itself. Under one approach these are reasons for bringing the case within the phrase "direct regulation of the United States," for the rules should cover the cases within its reasons. Under the other approach, they support the recognition of an immunity from direct regulation of the terms of government contracts in addition to the immunity from direct regulatory or tax laws addressed to the United States.

A. THE PRECEDENTS

In *Railroad Co.* v. *Peniston*, 18 Wall. 5, 41–42, Mr. Justice Bradley drew the governing distinction and "plainly stated the rule that government contracts are not subject to taxation or regulation by a State (emphasis added):

> The case differs *toto coelo* from that wherein the government enters into a contract with an individual or corporation to perform services necessary for carrying on the functions of government—as for carrying the mails, or troops, or supplies, or for building ships or works for government use. In those cases the govern-

> ment has no further concern with the contractor than in his contract and its execution. It has no concern with his property or his faculties independent of that. How much he may be taxed by, or what duties he may be obliged to perform towards, his State is of no consequence to the government, so long as his contract and its execution are not interfered with. In that case the contract is the means employed for carrying into execution the powers of the government, and *the contract* alone, and not the contractor, *is exempt from taxation or other interference by the State government.*

This passage was quoted by the Court with approval in the leading case of *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 155. See also the separate opinion of Mr. Justice Frankfurter in *City of Detroit* v. *Murray Corp.*, 335 U.S. 489, 495, 498.

The doctrine was squarely applied in *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, where this Court held that an Arkansas sales tax could not constitutionally be applied to sales to the federal government because the government's sovereign immunity had not been waived. The Arkansas law imposed an excise tax of two percent upon the gross receipts of all sales; the tax was to be paid to the State by the seller who, in turn, was required to collect it from the purchaser. Arkansas attempted to collect the tax upon a sale of tractors to be used in constructing a naval depot for the United States under a cost-plus-fixed-fee contract. Arkansas asserted that the sale was to the contractor and was therefore taxable

regardless of the incidence of the ultimate economic burden. Cf. *Alabama* v. *King & Boozer*, 314 U.S. 1. The United States and the contractor replied that the purchaser under this contract was the United States. The Court, agreeing that the United States was the purchaser, pointed out that its decisions "consistently prohibit taxes levied on the property or purchases of the Government itself" (347 U.S. at 123), and held that the application of the tax to the sale to the United States violated its constitutional immunity from State taxation even though the seller was the only formal addressee of the statutory command. The dissenting justices concluded that the contractor was the real purchaser but did not dispute the basic proposition that sovereign immunity exempts the United States from "taxes levied on the * * * purchases of the Government itself" (*ibid.*).

There is no ground that would benefit appellants for distinguishing between a State law imposing a tax upon sales which the seller is required to collect from the buyer and a State law fixing the price which the seller is required to collect. If there be a difference, the regulation is the more obnoxious because it frequently restricts the manner in which the governmental activities can be conducted. See pp. 83–86 below.

B. THE REASONS

The three dominant reasons for the immunity of the United States from direct State regulation or taxation of its officers or property, also support the proposition that a State may not directly regulate the terms of its contracts.

(1) It is inherent in the concept of sovereignty that neither the United States nor a State should assert the right to regulate or tax the activities of the other while confined to its constitutional orbit. The alternative is unseemly and harassing conflict. In the present case California has frankly asserted the power to dictate the price term which the United States may negotiate in its contracts with any California distributor for the purchase of milk. It is a matter of plain common sense that regulation of California's milk distributors in their dealings with the United States is regulation of the United States in its dealings with the distributors. A price term is no different from any other term in this regard. Regulation of the quantity of supplies needed by the federal government that may be delivered by local vendors *is* regulation of the supplies it can purchase. Regulation of the price to be charged by the distributor *is* regulation of the compensation to be paid by the purchaser. Indeed, regulation of the terms which private persons may put into contracts with the United States *is* regulation of the terms which the United States may put into contracts with these private persons. A contract is an integral relationship between two persons; it makes no difference whether its terms be prescribed from one side or the other.[37]

[37] It is, of course, true that in the present case (unlike its companion, *United States* v. *Georgia Public Service Commission*, No. 81, this Term) the theoretical possibility of the United States purchasing at unregulated prices from suppliers in other States remains open. However, in the case of a perishable commodity that theoretical possibility is rarely a realistic one.

These truths are expressly recognized in the California statute which prohibits federal officers, as purchasers, from contracting for lower or different prices than those specified in the milk price regulations (see *supra*, pp. 75–77), but the omission of all express references to purchasers would not reduce the unseemly inter-governmental conflict.

(2) A second reason for the immunity of the federal government from direct regulation of the activities of its officers and employees is the danger that, wholly aside from any increased economic burden, the application of such State laws would obstruct the United States in the attainment of constitutional purposes. The Court has stated in the broadest terms that the federal government's dealings with independent contractors are immune from State laws which "interfere in any substantial way with the performance of federal functions" (*James* v. *Dravo Contracting Co.*, 302 U.S. at 157, 161), "handicap efforts to carry out the plans of the United States" (*James Stewart & Co.* v. *Sadrakula*, 309 U.S. 94, 104), or "affect or embarrass in any substantial measure the power of the United States * * * to secure aid from independent contractors" (*Smith* v. *Davis*, 323 U.S.

Moreover, the heart of the constitutional infirmity in State regulation of the terms of federal contracts is present whether the State regulates all or merely most of any particular group of federal transactions. While the unconstitutionality of the State regulation is particularly clear where the government's freedom to negotiate for a particular term in contracts for supplies or services is completely circumscribed, the State cannot justify regulation of federal transactions by suggesting that the United States may alter its course of dealing in a burdensome way to avoid State regulation.

111, 115). See *Osborn* v. *United States Bank*, 9 Wheat. 738, 867. The danger of these consequences which is inherent in any State regulation addressed to federal officials in the course of performance of their authorized duties justifies a blanket immunity of these officials from such regulation. It equally justifies a grant of immunity from State regulation of the transactions of the United States.

The degree of actual interference will vary from instance to instance. However, the controlling principle leaves no room for distinctions between different governmental functions, or for judicial appraisal of the degree of obstruction. Whenever the regulation would directly impinge upon the employees, instrumentalities or activities of the United States, there is immunity in the absence of a Congressional waiver. Whenever the incidence of the statute is upon the contractor's activities incident to performance of the government contract as distinguished from its terms—regulation of the wages he pays his employees or his safety equipment, for example—there is no immunity in the absence of Congressional action no matter how heavy the resulting indirect economic burden may be. This test does not resolve all the difficulties in dealing with intergovernmental immunities, but it achieves sound relationships in most cases and furnishes a workable test.

It is hardly necessary to add that the risk of obstruction of the activities of the federal government is the same whether the State attempts to regulate the terms of its contracts in language which speaks of the promises and performance of the government

(here the purchaser), or of the private contractor (here the distributor). If a State cannot constitutionally forbid the United States from constructing a dam without securing the State's approval of the plans and specifications (*Arizona* v. *California*, 283 U.S. 423, 451–452), it cannot defeat the sovereign exemption by forbidding any contractor to work upon any dam the plans and specifications for which have not been approved.

There are three answers to any suggestion that price and rate regulation must be distinguished from other regulatory State legislation because they place only economic burdens upon the United States. The first answer is that this is not always true, as the opinion of the Court convincingly demonstrates in *Public Utilities Commission of California* v. *United States*, *supra*. We have also shown in our brief in that case how the rate regulation in issue in *United States* v. *Georgia Public Service Comm.*, No. 81, this Term, would interfere with the government's methods of shipping household goods of its personnel. Second, the thrust of the entire effort to establish workable rules in the field of intergovernmental immunities has been to get away from the appraisal of degrees of burden and to avoid such distinctions as those between a price, a price schedule which affects the kind of service available, and the other terms of performance. Third, the rule that those doing business with the United States cannot claim immunity from non-discriminatory taxation or regulation merely because of a resulting economic burden upon the United States does not mean there is no immunity whenever the only

practical impact is economic. Obviously, the practical impact of many non-discriminatory taxes, such as the real property tax is only economic, yet this Court's decisions "consistently prohibit taxes levied on the property *or purchases of the* Government itself." *Kern-Limerick, Inc.* v. *Scurlock,* 347 U.S. 110, 123. (Emphasis added.) One aim of the rule is "to keep the contracting governments from putting their hands in each others' pockets." T. R. Powell, *Vagaries and Varieties in Constitutional Interpretation,* p. 128.

(3) This brings us to the third reason for the basic distinction between direct taxation and regulation, and mere economic burdens. As the activities and responsibilities of the State and federal governments expanded, it became apparent that the doctrines of intergovernmental immunity exemplified by such decisions as *Gillespie* v. *Oklahoma,* 257 U.S. 501; *New York ex rel. Rogers* v. *Graves,* 299 U.S. 401, and *Panhandle Oil Co.* v. *Mississippi,* 277 U.S. 218, were not only closing off important sources of State revenue but were creating an ever-growing and likely-to-become odious class of persons who were not required to pay a normal share of the cost of public services because they had some connection with the government. The subsequent decisions holding that "the Government's constitutional immunity does not shield private parties with whom it does business from state taxes imposed on them merely because part or all of the financial burden of the tax eventually falls on the Government" (*United States* v. *City of Detroit,* 355 U.S. 466, 469) and cutting the implied immunity back to exemption from taxes on the government itself, or

its property, instrumentalities or purchases (*e.g.*, *James* v. *Dravo Contracting Co.*, 302 U.S. 134; *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466; *Alabama* v. *King & Boozer*, 314 U.S. 1), seem to us to reflect a desire to avoid those evils rather than utter indifference to whether the State and federal government put their hands into each other's pockets.

When the tax or regulation is levied upon the contractor as distinguished from the United States, its property or its contracts, the incidence of the resulting economic burden is problematical. No one could be sure whether the real beneficiary of the older immunity was the government or the employee or contractor. And while there are some cases in which one can be sure that a tax on the contractor will be borne by the United States, dollar for dollar (*e.g.*, *Alabama* v. *King & Boozer*, 314 U.S. 1),[38] in the generality of cases the distribution of the burden is indeterminable; all or part might be absorbed or spread out over other undertakings. In contrast, where the tax is upon the United States, its property or contracts, and must be paid by the federal government, recognition of the immunity gives no special privilege to private citizens and the government pays the tax, dollar for dollar. The State which attempts to collect such a tax is attempting to raise revenue from the federal government.

Direct price regulation has the same consequence. California's price regulation fixes the exact sum which

[38] In such cases it is significant that the burden has been voluntarily assumed by the United States in its contract, not imposed upon the federal government by the State.

must come out of the federal treasury, just like a tax upon federal property (*Van Brocklin* v. *Tennessee*, 117 U.S. 151) or upon the privilege of making shipments (see *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 155). The very aim would seem to be the same as a direct tax—to dip into the federal pocket to increase the return to California's distributors.

We believe that these considerations dictate a holding that the United States is immune from State regulation of the terms of its contracts whether this regulation is addressed to federal officials or to those who deal with them. It will be said that this conclusion is contrary to *Penn Dairies, Inc.* v. *Milk Control Commission*, 318 U.S. 261. Although the cases are distinguishable (see *supra*, p. 77), we are in fact challenging the soundness of the approach of the Court in the *Penn Dairies* case. A differentiation between the terms on which the government can buy and the conditions on which contractors may sell to the United States cannot be realistically maintained. The Court was sharply divided, five to three, and Mr. Justice Murphy, who was in the majority, appears to have been more influenced by the need for a wholesome supply of milk than by any rationale of intergovernmental immunities having general application. In the present case, as we have shown, regulation of the prices distributors may charge is direct regulation of the terms for which the federal government may negotiate; and therefore the sovereign is constitutionally immune.

We are not unmindful that the assertion of the implied constitutional exemption may sometimes im-

pair a system of State regulation or have untoward social or economic consequences. For example, after the lower court's decision in this case, the Executive Branch reviewed the underlying questions of policy and decided not to assert whatever immunity might apply to producer prices. Such problems ought never to be overlooked, but where the State regulation bears directly upon the United States, its activities or its contracts, it should be left to the policy-making branches of the government to determine whether to waive the sovereign immunity otherwise implied in the Constitution.

V

NONE OF APPELLANTS' CONTENTIONS OF PROCEDURAL ERRORS IN THE DISTRICT COURT ARE GROUNDS FOR REVERSAL OF THE DECISION BELOW

A. ABSTENTION

Appellants argue that the district court should have abstained from exercising jurisdiction over the federal questions presented in this case in order to allow the State courts first to construe the doubtful portions of the California statutes relating to the relinquishment of legislative jurisdiction and to determine whether the California Milk Act in fact imposes a prohibition upon the federal government. As the three-judge district court ruled, however, abstention was not required on either ground.

The doctrine of abstention forms a limited exception to the otherwise mandatory jurisdiction of a federal district court. Although the occasions for its use cannot be neatly characterized, several generalizations

may safely be ventured. (1) This Court has not authorized—much less required—a federal trial court to abstain from exercising its statutory jurisdiction unless one of two situations is present: (a) the necessity of deciding a troublesome constitutional issue hinges upon a preliminary and difficult question of State law; or (b) although no difficult constitutional issue is presented, the federal court is asked to decide a matter of peculiarly local concern or a matter within the particular competence of a local tribunal. (2) Abstention is most appropriate where the questions to be referred to a State tribunal can be considered in relative isolation from any remaining federal questions which are properly matters for the federal court. (3) The significant benefits of abstention are the prevention of premature decision of difficult and far-reaching constitutional questions; the desirability of consistent decisions in new areas of State law which can only be authoritatively shaped by State courts; the desirability of State decision of matters of only remote federal concern and of unusual local concern; the avoidance of federal decisions unnecessarily disrupting State regulatory schemes which could be saved by State court construction in light of constitutional doubts.

These criteria make clear that abstention was not required on the question of exclusive federal power over the tracts at Travis, Castle, and Oakland. No new and troublesome questions of constitutional law were presented by this issue. As we have pointed out, the only constitutional doctrines involved are long-settled by decisions of this Court. Nor was there a

separable issue of State law which could be referred to the State courts while reserving the federal questions for the federal court. Whether the State has "consented" to the federal purchase of land within the meaning of Article I, Section 8, Clause 17, is a question of federal law involving, unavoidably, the construction of the United States Constitution. See, *Mason Co.* v. *Tax Comm.*, 302 U.S. 186. This is plainly illustrated in the present case where the appellants' principle contention is that Article I, Section 8, Clause 17, requires not merely consent to the purchase of land (which California's "consent-to-purchase" statutes gave without substantial reservations) but also consent to a transfer of jurisdiction. The only issue on which federal recourse to the expertness of the State courts would, even arguably, be desirable—the relation of the State's "cession" statutes to its "consent-to-purchase" statutes—is one which would properly be subject to federal review, which has already been resolved by an opinion of the State attorney general, and which, in light of the legislative history, does not present a doubtful issue of statutory interpretation. (See, *supra*, pp. 46–53.)

The issue of transfer of jurisdiction is not one of solely and peculiarly local concern or one within the unusual competence of a local tribunal. The question involves the rights and powers of the United States government and presents a problem of federalism which is particularly appropriate for resolution in the federal courts. If any body of courts have unusual competence in dealing with the interpretation and effect of transfers of legislative jurisdiction, it is the

federal courts and not the local tribunals. Finally, resolution of the question of legislative jurisdiction by the federal district court does not threaten unnecessary interference with a State regulatory scheme. The question and the court's order relevant to this issue involve only a sharply defined and very limited area of State regulation—the applicability of its regulatory statutes to transactions consummated on federal enclaves. And no narrowing construction by a State court could have avoided the necessity of deciding the essentially federal questions as to the existence and effect of exclusive federal jurisdiction over the tracts at Travis, Castle, and Oakland.

It is even clearer that abstention was not required on the question whether California's statutes directly prohibit the United States and its officials from purchasing milk at prices lower than the minimum price schedule set by California. For, as we have shown above, the present case in no sense turns on this question. The possibility of California's enforcement of its Milk Act prohibitions against federal officers was entirely irrelevant to the issue of exclusive jurisdiction; was of only marginal relevance to the question of a conflict between the federal procurement policy and State regulation; and was relevant, but far from crucial, to proper consideration of the issue of the inherent constitutional immunity of the United States from State regulation of the terms of federal contracts. A State decision that the California penalties were inapplicable to federal procurement officials would neither avoid the necessity of, nor materially facilitate, the decision of any of the federal

constitutional issues in this case. An exercise of federal jurisdiction has never been stayed in these circumstances.

B. APPELLANTS' OTHER CLAIMS OF PROCEDURAL ERROR

The appellants' remaining objections to the procedures followed in the district court need only short discussion. Although, technically, the district court's final decision as to the applicability of California's Milk Act to purchases at Oakland was made at the preliminary-injunction stage, the issues presented and resolved were fully treated by both parties and were substantially identical to those carefully considered in the consolidated action involving Travis and Castle. Appellants have not suggested, either in the district court or in this Court, any issue of fact or law which could not be properly decided on the basis of the documents and arguments already before the district court in the two consolidated actions.

Finally, the propriety of the district court's temporary restraint of further proceedings against milk distributors in the State courts in the Oakland proceedings is only an issue in the present case if the case is to be reversed for other reasons and remanded to the district court for further proceedings. Whether or not the temporary restraining order was proper, the proceedings between different parties involved in the present case would properly have continued in the federal district court. *Stanton* v. *Embrey*, 93 U.S. 548. Had the temporary restraining order been vacated on appeal immediately after its issuance, the district court would still have been free to

proceed to judgment as it did. It is this judgment which is now under review by the court. Even if it is now held to have been error to issue the restraining order, the district court's judgment must stand if that court had jurisdiction and was correct in its decision on the merits.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted.

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SEPTEMBER 1962

APPENDIX A

California Statutes

The California Agricultural Code provides in pertinent part:

> 4350. Pursuant to the declaration and statements of facts, policy and purposes set forth in this chapter, the director is hereby vested with the additional administrative duty and authority to prescribe and enforce minimum wholesale and minimum retail prices for fluid milk, or fluid cream, or both, as hereinafter set forth, and to enforce the provisions of this article.
>
> * * * * *
>
> 4352. Minimum wholesale prices, as used herein, shall mean prices at which fluid milk or fluid cream, or both, shall be sold by distributors to retail stores including the prices at which fluid milk or fluid cream shall be sold by distributors to retail stores, restaurants, confectioneries and other places for consumption on the premises but excluding, however, the prices at which fluid milk or fluid cream, or both, shall be sold by distributors to retail stores owned or operated by such distributor. Minimum wholesale prices, as used herein, includes prices at which fluid milk or fluid cream, or both, shall be sold by distributors to other distributors, other than in bulk, which prices may vary from the minimum prices established for sales by distributors to other wholesale customers and which prices shall be known as "subdistributor prices." A subdistributor price shall be established for each marketing area and when fluid milk or fluid cream, or both, is purchased, other than in bulk, by one

distributor from another distributor for sale in a marketing area other than the marketing area where purchased the price paid shall not be less than the minimum subdistributor price for the marketing area in which the fluid milk or fluid cream, or both, is ultimately sold.

4353. Minimum retail prices, as used herein, shall mean minimum prices at which fluid milk or fluid cream, or both, shall be sold by distributors and retail stores to consumers.

* * * * *

4361. No distributor shall sell to any retail store, restaurant, confectionery or other place for consumption on or off the premises, or to any consumer, and no retail store, restaurant, confectionery or other place for consumption on or off the premises, shall purchase from any distributor or sell to any consumer, any fluid milk or fluid cream, or either of them, at less than the prices as established by the director under the provisions of this article. The use or attempted use of any method, device or transaction whereby any distributor sells or offers or agrees to sell to any retail store, restaurant, confectionery or other place for consumption on or off the premises, or to any consumer, or any retail store, restaurant, confectionery or other place for consumption on or off the premises buys or offers or agrees to buy from any distributor, or sells or offers or agrees to sell to any consumer, fluid milk or fluid cream, or either, at a price less than that established by the director under the provisions of this article, is prohibited whether such method, device or transaction applies directly to fluid milk, fluid cream or either or applies to or is used in connection with the sale or handling of any commodity, product or article. Prohibited methods, devices or transactions shall include, but not be limited to, any one or more of the following: discounts, rebates, free services, advertising allowances, leases of re-

frigeration or other equipment, gifts, or payments, allowances or credits made or given for, or in connection with, the return of containers or other property, unless such payment, allowance or credit is a repayment of a deposit or charge, in excess of the price established by the director under the provisions of this article, paid by a wholesale customer, or by a consumer, for the return of such containers or other property.

A distributor, or retail store, restaurant, confectionery or other place for consumption on or off the premises shall be considered to have violated the provisions of this section if it engages in such violation directly or through an agent, employee, or subsidiary or affiliated company or corporation. For purposes of this section subsidiary or affiliated company or corporation includes, but is not limited to, companies or corporations controlled by the distributor, or retail store, restaurant, confectionery or other place for consumption on or off the premises, directly or indirectly through ownership of issued capital stock or otherwise.

* * * * *

4410. (a) The violation of any provision of this chapter, or of any provision of any stabilization and marketing plan or any order of the director establishing minimum wholesale and minimum retail prices for fluid milk or fluid cream formulated under the provisions of this chapter, or of any of the unfair practices set forth in this chapter, or of any rule or regulation duly adopted and promulgated by the director under Section 4240, is a misdemeanor, and is furthermore ground for revocation or suspension of license in the manner set forth in this chapter. The unfair practice provisions described in this chapter are hereby declared to apply to all distributors, whether or not a plan is in effect in the area in which a distributor is licensed or carries on business.

(b) Every distributor must pay for fluid milk or fluid cream delivered to him or it at the time and in the manner specified in the contract with the producer; failure to make such payment is hereby declared to be a violation of this chapter, and ground for refusal, suspension or revocation of license in the manner set forth in this chapter.

(c) Any person who violates any provision of this chapter or of a stabilization and marketing plan or any order of the director establishing minimum wholesale and minimum retail prices for fluid milk or fluid cream or any rule or regulation duly adopted and promulgated by the director under Section 4240 shall be liable civilly in the sum of five hundred dollars ($500) for each and every violation, such sum to be recovered by the director in any court of competent jurisdiction. All sums recovered under this section shall be deposited in the State Treasury to the credit of the Department of Agriculture Fund.

Section 34, California Political Code, enacted 1872:

The legislature consents to the purchase or condemnation by the United States of any tract of land within this State for the purpose of erecting forts, magazines, arsenals, dock-yards and other needful buildings, upon the express condition that all civil process issued from the Courts of this State, and such criminal process as may issue under the authority of this State, against any person charged with crime, may be served and executed thereon in the same mode and manner and by the same officers as if the purchase or condemnation had not been made.

California Statutes of 1897, Chapter 56, page 51:

SECTION 1. The State of California hereby cedes to the United States of America exclusive jurisdiction over all lands within this State

now held, occupied, or reserved by the Government of the United States for military purposes or defense, or which may hereafter be ceded or conveyed to said United States for such purposes; *provided*, that a sufficient description by metes and bounds and a map or plat of such lands be filed in the proper office of record in the county in which the same are situated; and *provided further*, that this State reserves the right to serve and execute on said lands all civil process, not incompatible with this cession, and such criminal process as may lawfully issue under the authority of this State against any person or persons charged with crimes committed without said lands.

SEC. 2. This Act shall take effect immediately.

California Statutes of 1891, Chapter 181, page 262:

SECTION 1. The State of California hereby cedes to the United States of America exclusive jurisdiction over such piece or parcel of land as may have been or may be hereafter ceded or conveyed to the United States, during the time the United States shall be or remain the owner thereof, for all purposes except the administration of the criminal laws of this State and the service of civil process therein.

SEC. 2. This Act shall take effect immediately.

Section 34, Political Code, as amended by California Statutes of 1939, Chapter 710, page 2231:

The Legislature consents to the purchase or condemnation by the United States of any tract of land within this State for the purpose of erecting forts, magazines, arsenals, dockyards, and other needful buildings, upon the express condition that all civil process issued from the courts of this State, and such criminal process as may issue under the authority of this State, against any person charged with crime, may be

served and executed thereon in the same mode and manner and by the same officers as if the purchase or condemnation had not been made and upon the further express condition that the State reserves its entire power of taxation with respect to such tracts of land and may levy and collect all taxes now or hereafter imposed in the same manner and to the same extent as if this consent had not been granted.

The authority to serve civil and criminal process and power to tax hereinabove reserved to the State in the case of the purchase or condemnation by the United States of any tract of land within this State shall, any law to the contrary notwithstanding, also be reserved to the State with respect to any tract of land over which any jurisdiction is ceded or granted by the State to the United States under any law of this State now in effect or which may hereafter be adopted, the authority and power herein reserved by the State to be exercised in the same manner and to the same extent as if such jurisdiction had not been ceded or granted by the State to the United States.

Government Code, Section 111, as set forth in California Statutes 1943, Chapter 134, page 898:

"The Legislature consents to the purchase or condemnation by the United States of any tract of land within the State for the purpose of erecting forts, magazines, arsenals, dockyards, and other needful buildings, reserving the authority to serve and execute process and the State's entire power of taxation as provided in this article.

Government Code, Section 113, as set forth in California Statutes 1943, Chapter 134, page 898:

"The State cedes to the United States exclusive jurisdiction over such land as has been or may be ceded or conveyed to the United

States, during the time the United States is the owner thereof, reserving the administration of the criminal law of the State, the authority to serve and execute process and the State's entire power of taxation.

Government Code, Section 111, as set forth in California Statutes of 1943, Chapter 134, page 898:

The State cedes to the United States exclusive jurisdiction over all lands within the State held, occupied, or reserved on March 2, 1897 by the United States for military purposes or defense, and over all land which thereafter has been or which may be ceded or conveyed to the United States for such purposes reserving the authority to serve and execute process, and the State's entire power of taxation. A sufficient description by metes and bounds and a map or plat of the lands shall first be filed in the proper office of record in the county in which the lands are situated.

Government Code, Section 126, as set forth in California Statutes, First Extraordinary Session 1946, Chapter 154, page 199:

Notwithstanding any other provision of law, general or special, the Legislature of California consents to the acquisition by the United States of land within this State upon and subject to each and all of the following express conditions and reservations, in addition to any other conditions or reservations prescribed by law:

(a) The acquisition must be for the erection of forts, magazines, arsenals, dockyards, and other needful buildings, or other public purpose within the purview of Clause 17 of Section 8 of Article I of the Constitution of the United States;

(b) The acquisition must be pursuant to and in compliance with the laws of the United States;

(c) The United States must have acquired title to the land and must in writing have assented to acceptance of jurisdiction over the land upon and subject to each and all of the conditions and reservations in this section prescribed;

(d) The conditions prescribed in subdivisions (a), (b), and (c) of this section must have been found and declared to have occurred and to exist, by the State Board of Equalization, and the board must have found and declared that such acquisition is in the interest of the State, certified copies of its orders or resolutions making such findings and declarations to be filed in the office of the Secretary of State and recorded in the office of the county recorder of each county in which any part of the land is situate;

(e) In granting this consent, the Legislature and the State reserve jurisdiction on and over the land for the execution of civil process and criminal process in all cases, and the State's entire power of taxation including that of each State agency, county, city, city and county, political subdivision or public district of or in the State; and reserves to all persons residing on such land all civil and political rights, including the right of suffrage, which they might have were this consent not given.

(f) This consent continues only so long as the land continues to belong to the United States and is held by it in accordance and in compliance with each and all of the conditions and reservations in this section prescribed.

The finding and declaration of the State Board of Equalization provided for in subdivision (d) of this section shall be made only after a public hearing. Notice of such hearing shall be published once in a newspaper of general circulation in each county in which the land or any part thereof is situated and a copy of such notice shall be personally served upon

the clerk of the board of supervisors of each such county. The State Board of Equalization shall make rules and regulations governing the conditions and procedure of such hearings, which shall provide that the cost of publication and service of notice shall be borne by the owner or transferee of the property.

The provisions of this section do not apply to any land or water areas heretofore or hereafter acquired by the United States for migratory bird reservations in accordance with the provisions of Sections 375 to 380, inclusive, of the Fish and Game Code.

Government Code, Section 113, as amended and set forth in California Statutes of 1947, Chapter 1532, page 3164:

SEC. 2. Section 113 of said code is amended to read:

113. The State reserves the administration of the criminal law of the State with respect to any land over which any jurisdiction has been of may be ceded or conveyed to the United States, during the time the United States is the owner thereof.

APPENDIX B

FEDERAL STATUTORY PROVISIONS

The pertinent Armed Services procurement provisions are 70A Stat. 127–133, as amended, 10 U.S.C. 2301–2314. Section 2304 provides:

> 2304. Purchases and contracts: formal advertising; exceptions.
>
> (a) Purchases of and contracts for property or services covered by this chapter shall be made by formal advertising. However, the head of an agency may negotiate such a purchase or contract, if—
>
> * * * * *
>
> (8) the purchase or contract is for property for authorized resale;
>
> (9) the purchase or contract is for perishable or nonperishable subsistence supplies;
>
> (10) the purchase or contract is for property or services for which it is impracticable to obtain competition;
>
> * * * * *
>
> (15) the purchase or contract is for property or services for which he determines that the bid prices received after formal advertising are unreasonable as to all or part of the requirements, or were not independently reached in open competition, and for which (A) he has notified each responsible bidder of intention to negotiate and given him reasonable opportunity to negotiate; (B) the negotiated price is lower than the lowest rejected bid of any responsible bidder, as determined by the head of the agency; and (C) the nego-

tiated price is the lowest negotiated price offered by any responsible supplier;

* * * * * *

Section 2305 provides:

* * * * * *

(c) * * * Awards shall be made with reasonable promptness by giving written notice to the responsible bidder whose bid conforms to the invitation and will be the most advantageous to the United States, price and other factors considered. However, all bids may be rejected if the head of the agency determines that rejection is in the public interest.

* * * * * * *

APPENDIX C

Federal Regulations

The Armed Services Procurement Regulations provide in pertinent part:[39]

> 1-301 Methods of Procurement. It shall be the objective to use that method of procurement which will be most advantageous to the Government—price, quality, and other factors considered. Such procurement shall be made on a competitive basis, whether by formal advertising or by negotiation, to the maximum practicable extent, in accordance with the policies and procedures set forth in this Regulation. Procurement shall be effected by advertising for bids and thereafter awarding a contract to the lowest responsible bidder, in accordance with the detailed requirements and procedures set forth in Section II; except that procurement may be effected by negotiation when authorized by and conducted in accordance with the detailed requirements and procedures set forth in Section III. Procurement may also be effected, as provided in Sections IV and V, by such means as coordinated procurement or interdepartmental procurement.
>
> * * * * *
>
> 1-302.2 *Sources Outside the Government.* Irrespective of whether the procurement of supplies or services from sources outside the Government is to be effected by formal advertising or by negotiation, competitive proposals

[39] The federal regulations are set forth here as they are found in the record at R. 16–22 (ASPR), 24–27 (Army), 740–743 (Air Force).

("bids" in the case of procurement by formal advertising, "proposals" in the case of procurement by negotiation) shall be solicited from all such qualified sources of supplies or services as are deemed necessary by the contracting officer to assure such full and free competition as is consistent with the procurement of types of supplies and services necessary to meet the requirements of the Military Department concerned, and thereby to obtain for the Government the most advantageous contract—price, quality, and other factors considered.

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3–100 SCOPE OF PART. This Part deals with the nature and use of negotiation as distinguished from formal advertising, and with limitations upon that use.

3–101 NEGOTIATION AS DISTINGUISHED FROM FORMAL ADVERTISING. Whenever supplies or services are to be procured by negotiation, price quotations (see ASPR Section XVI, Part 2), supported by statements and analyses of estimated costs or other evidence of reasonable prices and other vital matters deemed necessary by the contracting officer, shall be solicited from all such qualified sources of supplies or services as are deemed necessary by the contracting officer to assure full and free competition consistent with the procurement of the required supplies or services, in accordance with the basic policies set forth in Section I, Part 3, to the end that the procurement will be made to the best advantage of the Government, price and other factors considered. Negotiation shall thereupon be conducted, by contracting officers and their negotiators, with the attention being given to the following and any other appropriate factors:

(i) comparison of prices quoted, and consideration of other prices for the same or simi-

lar supplies or services, with due regard to production costs, including extra-pay shift, multi-shift and overtime costs, and any other factor relating to price, such as profits, cost of transportation, and cash discounts;

(ii) comparison of the business reputations, capabilities, and responsibilities of the respective persons or firms who submit quotations (see ASPR 1–903);

(iii) consideration of the quality of the supplies or services offered, or of the same or similar supplies or services previously furnished, with due regard to the satisfaction of technical requirements;

(iv) consideration of delivery requirements (see ASPR 1–306);

(v) discriminating use of price and cost analyses (see ASPR 16–206);

(vi) investigation of price aspects of any important subcontract;

(vii) individual bargaining, by mail or by conference;

(viii) consideration of cost sharing;

(ix) effective utilization in general of the most desirable type of contract and in particular of contract provisions relating to price redetermination (see Section III, Part 4);

(x) consideration of the size of the business concern (see ASPR 1–302.3 and 3–104);

(xi) consideration as to whether the prospective supplier is a planned producer under the industrial mobilization program;

(xii) consideration as to whether the prospective supplier requires expansion or conversion of plant facilities;

(xiii) consideration as to whether the prospective supplier is located in a surplus or scarce labor area (see ASPR 3–105);

(xiv) consideration as to whether the prospective supplier will have an adequate supply of qualified labor;

(xv) consideration of the extent of subcontracting;

(xvi) consideration of the existing and potential workload of the prospective supplier;

(xvii) consideration of broadening the industrial base by the development of additional suppliers;

(xviii) consideration of whether the contractor requires Government-furnished property, machine tools, or facilities; or Government-operated test facilities;

(xix) consideration of contract performance in facilities located in dispersed sites; and

(xx) advantages or disadvantages to the Government that might result from making multiple awards.

3–102 GENERAL REQUIREMENTS FOR NEGOTIATION. No contract shall be entered into as a result of negotiation unless or until the following requirements have been satisfied:

(i) the contemplated procurement comes within one of the circumstances permitting negotiation enumerated in Section III, Part 2;

(ii) any necessary determinations and findings prescribed in Section III, Part 3, have been made;

(iii) such business clearance or approval as is prescribed by applicable Departmental procedures has been obtained; and

(iv) the prospective contractor has been determined to be responsible in accordance with ASPR Section I, Part 9.

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PROCUREMENT BY NEGOTIATION

Part 8– Price Negotiation Policies and Techniques

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3–801.1 General. It is the policy of the Department of Defense to procure supplies and services from responsible sources at fair and reasonable prices calculated to result in the lowest ultimate over-all cost to the Government. Sound pricing depends primarily upon the

exercise of sound judgment by all personnel concerned with the procurement.

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Army Procurement Procedure 3-101 provides:

3-101 NEGOTIATION AS DISTINGUISHED FROM FORMAL ADVERTISING.

a. *Competition.* The fact that a procurement is to be negotiated does not relax the requirements for competition. When supplies or services are to be procured by negotiation and when consistent with the accomplishment of procurement objectives, quotations or proposals shall be solicited from all such qualified sources of (as defined in ASPR and APP *1-201.9*) supplies or services as are deemed necessary to insure effective competition and to insure that the procurement is made to the best advantage of the Government, price and other factors considered, in accordance with the basic policies set forth in Part 3, Section I, ASPR and APP. Competition is not necessary in contracting for personal or professional services.

b. *Conduct of Negotiations.* Procurement by negotiation is less automatic than, and does not have the rigid limitations of, formal advertising bid and award procedures; it allows to a greater extent than formal advertising the exercise of sound business judgment but in no way decreases the responsibility for properly protecting the interests of the Government.

(1) Contracting officers should conduct contract negotiations to the best advantage of the Government. They may bargain with any number of interested suppliers at any time prior to the award of a contract, as deemed desirable and practicable. After receipt of the initial proposals, separate negotiations may be conducted with any source of supply submitting an offer. The contract should be placed with the supplier making the best final proposal and who has the requisite ability to perform.

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(2) Negotiation will be accomplished to the end that maximum pricing benefits from all negotiated transactions may be realized. Benefits are obtainable through complete negotiation of transactions, particularly when one or several of the proposals indicate, or it is otherwise evident, that further negotiation may result in better pricing. During negotiations potential suppliers must be informed of the provisions which will appear in the contract to be executed.

(3) During the negotiation of contracts, simultaneous coordination, to the greatest practical extent, shall take place among the contracting, technical, price analysis, legal, and industrial planning personnel. Instructions to be followed by negotiating teams will be prepared with full coordination of traffic management consultants in purchasing offices, and such teams will be directed to seek traffic management advice upon the appearance of new traffic elements (such as change in shipping points, specifications, etc.) in the negotiations.

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c. *Requests for Proposals.*

(1) When a procurement of supplies or services is to be announced in writing to prospective contractors for the purpose of requesting quotations and other terms as a basis for conducting negotiations, contracting officers shall use DD Form 747 (Request for Quotations) or a DD Form 746 (Request for Proposals and Proposal). See ASPR 16-201 and 16-203.

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Air Force Procurement Regulation. Paragraphs 2-000, 2-101, and 2-102 provide:

2-000 Scope of Section. In recognition of the fact that formal advertising is the basic method of procurement by the Government, this Section gives detailed guidance to AF

procurement personnel for adapting formal advertising procedures to use in fulfilling as many procurement requirements as possible. In particular, Part 20 sets forth many examples of special provisions which may be incorporated in Invitations for Bids to assure that the Government's requirements will be fully met and at the same time preserve the benefits of full and free competition which are inherent in formal advertising.

PART 1—USE OF FORMAL ADVERTISING

2–101 Meaning of Formal Advertising. Formal advertising involves three basic steps. First, the preparation of an Invitation for Bids, in the prescribed form, describing the requirement of the Government accurately and completely, but avoiding any limitations which have no reasonable relationship to the actual needs of the Government and which might tend to limit the number of bidders (see AFPI 2-201). Second, publicizing the Invitation for Bids through posting in public places, distributing to prospective bidders, and such other means as may be appropriate, in sufficient time to enable prospective bidders to prepare and submit formal bids before the time slated for public opening of bids (see AFPI 2–202). Third, awarding the contract, on the basis of the bids publicly opened, to that responsive, responsible bidder whose bid is most advantageous to the Government, price and other factors considered. (See Part 4 of this Section.)

2–102 USE FOR FORMAL ADVERTISING

(a) *Statutory Requirement.* 10 U.S.C. 2304 (a) provides that all contracts for supplies or services, with certain stated exceptions, will be made by formal advertising. (See ASPR and AFPI Section III, Part 2 for discussion of the exceptions.)

(b) *House of Representatives Report.* The House Committee on Armed Services, section 2(c) of House Report No. 1688 (84th Congress, 2nd Session, January 1956) accompanying H.R. 8710, has stated as follows:

The amendment adds a new subsection. In it, we have stated positively the intention of Congress that all procurement shall be by advertised bidding. We have said, in clear language, that none of the exceptions 2(c)(1) through (17) shall be used by the agency head unless the facts and circumstances in justification thereof are clear and convincing.

We mean by this that "borderline" cases or "Grey areas," as they are sometimes referred to, and any case in doubt or uncertainty shall be resolved in favor of advertised competitive bidding and not by resorting to these 17 exceptions.

The Comptroller General, in his vigilant examination of the operation of this Act and of procurement practices generally, will, as the agent of Congress, be fully advised and fortified by this firm expression of congressional intent. And moreover, no agency head can now be in any doubt whatsoever as to what Congress expects of him. We cannot be more explicit.

We propose that the trend shall be toward advertised competitive procurement and that advertised competitive procurement will be the rule, that in every case in which the agency head or his subordinates look toward the exceptions of the Act, they are met with the expression of congressional intent in this act, as amended, that what they do must be supported by a justification which is both clear and convincing. And the Congress will examine the findings that are required under the act, from time to time, to determine whether this mandate is being followed. We are determined that

the trend which prompted this inquiry, shall be reversed.

(c) *Air Force Policy.*

(1) The AF policy is to use formal advertising procedures whenever possible notwithstanding the existence of a negotiation authority under 10 U.S.C. 2304(a) and ASPR and AFPI Section III, Part 2. Thus negotiation authority will be used only when the facts and circumstances of the procurement clearly indicate the need to use the authority. For example, 10 U.S.C. 2304(a)(9) authorizes the procurement of perishable subsistence supplies by negotiation. Milk is perishable subsistence as defined in AFR 145–11 and Rulings and Interpretations of the Walsh-Healy Public Contracts Act, but troop issue requirements are adequately covered by specifications and competition is generally available, accordingly, such procurements of milk should be advertised when volume quantities are involved.

(2) Before the negotiation authority of ASPR 3–202 or 3–210 is used, officials approving determinations and findings (see AFPI 3–306(b)) will satisfy themselves that formal advertising procedures cannot be used without detriment to the Government, and that the facts and circumstances in justification of negotiation are clear and convincing.

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